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No. 08-

IN THE

Supreme Court of the United States

NATIONAL MINING ASSOCIATION,
Petitioner,

v.

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Surface Mining Control and Reclamation Act (SMCRA) limits mining on certain lands, but expressly protects the property interests of those with "valid existing rights" to mine coal. That key statutory phrase—"valid existing rights"—appears in one formulation or another in more than 100 federal statutes. Despite the phrase's lengthy pedigree and the settled expectations of the coal industry and other owners of interests in land, the D.C. Circuit declared the phrase ambiguous, deferring to a counter-textual interpretation promulgated by the Office of Surface Mining Reclamation and Enforcement (OSM) that vitiated property owners' rights throughout the Nation. The court reached this result by relying on a new rule of statutory construction: A common statutory phrase is categorically ambiguous if just one word in that phrase—here, the word "rights" in the phrase "valid existing rights"—has multiple dictionary definitions.

The questions presented are:

1. Whether the D.C. Circuit correctly held—in conflict with this Court's precedents—that a statutory phrase is necessarily ambiguous and triggers *Chevron* deference because a single word within that phrase is itself ambiguous.

2. Whether the D.C. Circuit correctly declined to narrow OSM's statutory construction even though its interpretation will trigger takings claims.

PARTIES TO THE PROCEEDINGS

Petitioner is the National Mining Association (NMA). NMA was the plaintiff in the District Court and appellant before the United States Court of Appeals for the District of Columbia Circuit.

Respondents Dirk Kempthorne, Secretary of the Interior, United States Department of the Interior, and Brent Wahlquist, the Director of the Office of Surface Mining Reclamation and Enforcement, were defendants in the District Court and appellees before the United States Court of Appeals for the District of Columbia Circuit.

The National Wildlife Federation, Citizens Coal Council, National Trust for Historic Preservation in the United States, and Kentucky Resources Council, Inc., were intervenors-defendants in the District Court and intervenors-appellees in the United States Court of Appeals for the District of Columbia Circuit. The National Council of Coal Lessors, Inc., also filed an *amicus* brief in support of NMA in the court of appeals.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATORY PROVISIONS INVOLVED 2

INTRODUCTION 2

STATEMENT OF THE CASE 5

A. Factual Background 5

B. Proceedings Below 13

REASONS FOR GRANTING THE WRIT 15

I. THE RULING BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS 15

II. BY REJECTING *RIVERSIDE BAYVIEW HOMES*' CONSTITUTIONAL AVOIDANCE RULE, THE RULING BELOW TRIGGERS A CIRCUIT SPLIT AND INJECTS FURTHER UNCERTAINTY INTO THE RULE'S PROPER APPLICATION 26

A. The Lower Courts Are Confused About How To Apply *Riverside Bayview Homes*' Constitutional Avoidance Rule 27

TABLE OF CONTENTS—Continued

Page

B. The Ruling Below Exacerbates The Confusion In The Lower Courts By Causing A Circuit Split 31

III. THIS CASE PRESENTS AN IDEAL VEHICLE TO ADDRESS A QUESTION OF SIGNIFICANT NATIONAL IMPORTANCE 33

CONCLUSION 36

APPENDICES

APPENDIX A:

Opinion of the Court of Appeals, dated January 15, 2008 ..... 1a

APPENDIX B:

Memorandum Opinion of the District Court, dated May 4, 2006 ..... 17a

APPENDIX C:

Order Denying Panel Rehearing, dated March 14, 2008 ..... 37a

Order Denying Rehearing *En Banc*, dated March 14, 2008 ..... 38a

APPENDIX D:

Letter from Chief Justice Roberts Extending Petitioner's Time to File, dated June 4, 2008 ..... 39a

APPENDIX E:

List of Over 100 Federal Statutes Protecting Valid Existing Rights 40a

TABLE OF AUTHORITIES

Page

Cases:

Adams Fruit Co. v. *Barrett*, 494 U.S. 638 (1990) 15-16

Aleknagik Natives Ltd. v. *United States*, 806 F.2d 924 (9th Cir. 1986) 8

Bell Atl. Tel. Cos. v. *FCC*, 24 F.3d 1441 (D.C. Cir. 1994) 30, 31

Bragdon v. *Abbott*, 524 U.S. 624 (1998) 21

Brown v. *Gardner*, 513 U.S. 115 (1994) 19

Building Owners & Managers Ass'n Int'l v. *FCC*, 254 F.3d 89 (D.C. Cir. 2001) 29

Chevron U.S.A. Inc. v. *Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984) ..... *passim*

Citizens Coal Council v. *Norton*, 330 F.3d 478 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1180 (2004) 5-6

Colorado Envtl. Coal. v. *Bureau of Land Mgmt.*, 932 F. Supp. 1247 (D. Colo. 1996) 8

Commonwealth of Va. ex rel. Va. Dep't of Conservation & Econ. Dev. v. *Watt*, 741 F.2d 37 (4th Cir. 1984), *cert. dismissed sub nom. Va. Dep't of Conservation & Econ. Dev.* v. *Clark*, 469 U.S. 1198 (1985) 35

TABLE OF AUTHORITIES—Continued

Page

Crawford Fitting Co. v. *J.T. Gibbons, Inc.*, 482 U.S. 437 (1987) 24

Davis v. *Michigan Dep't of Treasury*, 489 U.S. 803 (1989) 16

Dolan v. *United States Postal Serv.*, 546 U.S. 481 (2006) 17, 18

Dole v. *United Steelworkers of Am.*, 494 U.S. 26 (1990) 19

Edward J. DeBartolo Corp. v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988) 26

Environmental Action, Inc. v. *FERC*, 939 F.2d 1057 (D.C. Cir. 1991) 21

Florida Rock Indus., Inc. v. *United States*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987) 29

Food & Drug Admin. v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) 19

Forest Guardians v. *Dombeck*, 131 F.3d 1309 (9th Cir. 1997) 8

GTE Serv. Corp. v. *FCC*, 205 F.3d 416 (D.C. Cir. 2000) 30

General Dynamics Land Sys., Inc. v. *Cline*, 540 U.S. 581 (2004) 15

TABLE OF AUTHORITIES—Continued

Page

Gilbert v. *United States*, 370 U.S. 650 (1962) 21

Hawaiian Airlines, Inc. v. *Norris*, 512 U.S. 246 (1994) 21

Hinton v. *Udall*, 364 F.2d 676 (D.C. Cir. 1966) 8

Hodel v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981) ..... *passim*

Independent Fed'n of Flight Attendants v. *Zipes*, 491 U.S. 754 (1989) 21

Iowa Utils. Bd. v. *FCC*, 219 F.3d 744 (8th Cir. 2000), *rev'd in part on other grounds sub nom. Verizon Commc'ns, Inc.* v. *FCC*, 535 U.S. 467 (2002) 28-29

Jarecki v. *G.D. Searle & Co.*, 367 U.S. 303 (1961) 16

KP Permanent Make-Up, Inc. v. *Lasting Impression I, Inc.*, 543 U.S. 111 (2004) 25

Kile v. *Belisle*, 759 P.2d 1292 (Ala. 1988) 9

King v. *St. Vincent Hosp.* 502 U.S. 215 (1991) 17

MCI Telecomms. Corp. v. *AT&T Co.*, 512 U.S. 218 (1994) 19

TABLE OF AUTHORITIES—Continued

Page

McDermott Int'l, Inc. v. *Wilander*, 498 U.S. 337 (1991) 21, 22

Morissette v. *United States*, 342 U.S. 246 (1952) 21

NLRB v. *Catholic Bishop of Chi.*, 440 U.S. 490 (1979) 26

NLRB v. *Federbush Co.*, 121 F.2d 954 (2d Cir. 1941) 16

National Ass'n of Home Builders v. *Defenders of Wildlife*, 127 S. Ct. 2518 (2007) 18

National Mining Ass'n v. *Babbitt*, 172 F.3d 906 (D.C. Cir. 1999) 30

National Mining Ass'n v. *Kempthorne*, 512 F.3d 702 (2008) 1

National Wildlife Fed'n v. *Hodel*, 839 F.2d 694 (D.C. Cir. 1988) ..... *passim*

Northern Alaska Envtl Ctr. v. *Lujan*, 872 F.2d 901 (9th Cir. 1989) 8

Railway Labor Executives' Ass'n v. *United States*, 987 F.2d 806 (D.C. Cir. 1993) 30

Robinson v. *Shell Oil Co.*, 519 U.S. 337 (1997) 16

TABLE OF AUTHORITIES—Continued

Page

Russello v. *United States*, 464 U.S. 16 (1983) 25

Rust v. *Sullivan*, 500 U.S. 173 (1991) 26

Seldovia Native Ass'n, Inc. v. *Lujan*, 904 F.2d 1335 (9th Cir. 1990) 8

Shell Oil Co. v. *Iowa Dep't of Revenue*, 488 U.S. 19 (1988) 16

Smith v. *City of Jackson*, 544 U.S. 228 (2005) 21

Stupak-Thrall v. *Glickman*, 988 F. Supp. 1055 (W.D. Mich. 1997) 8

Texas Office of Pub. Util. Counsel v. *FCC*, 183 F.3d 393 (5th Cir. 1999), *cert. denied sub nom. Celpage, Inc.* v. *FCC*, 530 U.S. 1210 (2000), *and AT&T Corp.* v. *Cincinnati Bell Tel. Co.*, 530 U.S. 1223 (2000), *and cert. dismissed sub nom. GTE Service Corp.* v. *FCC*, 531 U.S. 975 (2000) 27-28

Transmission Access Policy Study Group v. *FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002) 29

United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

United States v. *Security Indus. Bank*, 459 U.S. 70 (1982) 27

United States Navigation Co. v. *Cunard S.S. Co.*, 284 U.S. 474 (1932) 22

West Va. Univ. Hosps., Inc. v. *Casey*, 499 U.S. 83 (1991) 22

Constitution:

U.S. Const. amend. V 2

Statutes:

Federal Land Policy & Management Act of 1976, Pub. L. No. 94-579, § 701(h) (codified at 43 U.S.C. § 1701 (note)) 7

Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201 *et seq.*) ..... *passim*

10 U.S.C. § 7439(b) 7

16 U.S.C. § 47e 7

16 U.S.C. § 80a 7

16 U.S.C. § 90 7

16 U.S.C. § 100c 7

16 U.S.C. § 410bb(c) 7

16 U.S.C. § 410aaa-25 7

TABLE OF AUTHORITIES—Continued

Page

16 U.S.C. § 460v-4 8
16 U.S.C. § 460q-5 8
16 U.S.C. § 460dd-2(a) 8
16 U.S.C. § 460mm-1 8
16 U.S.C. § 460qq(c) 8
16 U.S.C. § 539(b) 7
16 U.S.C. § 1133(d)(3) 23
16 U.S.C. § 1280(a)(ii)-(iii) 23
16 U.S.C. § 1280(b) 23
16 U.S.C. § 1604(i) 8
16 U.S.C. § 4308(d) 7
25 U.S.C. § 293b 7
25 U.S.C. § 575 7
25 U.S.C. § 1780j(a)(1) 7
28 U.S.C. § 1254(1) 2
30 U.S.C. § 1201 5
30 U.S.C. § 1202(a) 6
30 U.S.C. § 1202(f) 5, 6
30 U.S.C. § 1256 24
30 U.S.C. § 1257 24

TABLE OF AUTHORITIES—Continued

Page

30 U.S.C. § 1258 24
30 U.S.C. § 1259 24
30 U.S.C. § 1260 24
30 U.S.C. § 1260(b)(5)(B) 24
30 U.S.C. § 1260(d)(2) 24
30 U.S.C. § 1261 24
30 U.S.C. § 1262 24
30 U.S.C. § 1263 24
30 U.S.C. § 1264 24
30 U.S.C. § 1265 24
30 U.S.C. § 1266 24
30 U.S.C. § 1272(a)(6) 24
30 U.S.C. § 1272(e) 6
30 U.S.C. § 1272(e)(1) 23
30 U.S.C. § 1276(a)(1) 35
30 U.S.C. § 1281 7
30 U.S.C. § 1291(28)(B) 11
42 U.S.C. § 6502 7
43 U.S.C. § 1223 7
43 U.S.C. § 1610(a)(1) 7

TABLE OF AUTHORITIES—Continued

Page

43 U.S.C. § 1633(c) 7

43 U.S.C. § 1785(c)(2)(A) 7

45 U.S.C. § 1203(b)(1)(B) 7

45 U.S.C. § 1210 7

48 U.S.C. § 1545(b)(2) 7

48 U.S.C. § 1705(a) 7

48 U.S.C. § 1971(a) 7

Legislative Materials:

H.R. Rep. No. 95-218 (1977), *reprinted in* 1977 U.S.C.C.A.N. 593 9

S. Rep. No. 95-128 (1977) 9

Regulations:

30 C.F.R. § 761.5 31

30 C.F.R. § 761.5(a) 10

30 C.F.R. § 761.5(a)(b)(2) 11

30 C.F.R. § 761.5(b)(1) 11

64 Fed. Reg. 70,766 (Dec. 17, 1999 final rule) ..... *passim*

Exec. Order No. 7624, 2 Fed. Reg. 1119 (May 29, 1937) 6-7

Proclamation No. 6920, 61 Fed. Reg. 50,223 (Sept. 18, 1996) 6

TABLE OF AUTHORITIES—Continued

Page

Proclamation No. 7397, 66 Fed. Reg. 7354 (Jan. 22, 2001) 6

Rules:

S. Ct. R. 10(a) 33

S. Ct. R. 10(c) 25

Other Authorities:

2B Norman L. Singer, *Sutherland Statutory Construction* § 51:2 (7th ed. 2008) 21

Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527 (1947) 21

Jan G. Laitos, *The Nature & Consequence of "Valid Existing Rights" Status in Public Land Law*, 5 J. Min. L. & Pol'y 399 (1989) 6

Louis J. Dobbs, 77 Interior Dec. 5 (Jan. 15, 1970) 9

Note, *Regulation & Land Withdrawals: Defining "Valid Existing Rights,"* 3 J. Min. L. & Pol'y 517 (1988) 7, 8

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PETITION FOR A WRIT OF CERTIORARI

The National Mining Association (NMA) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the D.C. Circuit affirming the District Court's dismissal of NMA's challenge to OSM's "valid existing rights" rule is reported at 512 F.3d 702 and reprinted in the appendix hereto (App.) at 1a. The memorandum opinion of the District Court is unpublished and is reprinted at App. 17a.

JURISDICTION

The judgment of the Court of Appeals was entered on January 15, 2008. App. 1a. A timely petition for panel rehearing and rehearing *en banc* was denied on March 14, 2008. App. 37a-38a. On June 4, 2008, Chief Justice Roberts extended the time within which to file a petition for a writ of certiorari, to and including July 12, 2008. App. 39a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part: "[N]or shall private property be taken for public use without just compensation." U.S. Const. amend. V.

Section 522(e) of SMCRA provides in relevant part: "After August 3, 1977, and subject to valid existing rights no surface coal mining operations except those which exist on August 3, 1977, shall be permitted [in areas designated in subsections (1)-(5)]."

INTRODUCTION

When it enacted SMCRA, Congress established a federal regime to regulate coal mining. Among other things, the Act banned surface coal mining operations on certain federal, state, and private lands. But Congress was careful to craft an important exception to this otherwise categorical ban: mining could continue on lands in which miners held "valid existing rights," commonly referred to as VER.

VER clauses similar to the one codified in SMCRA are a commonplace in federal land-use regulations. Over the past century, Congress and the Executive

have used the same or a substantively similar phrase in over 100 statutes and proclamations for generally the same purpose: to protect pre-existing property rights from being impaired by subsequently enacted policy changes. VER clauses thus represent a critical safeguard for the many owners of property rights in lands that supply this Nation's critical natural resources—such as minerals, oil, gas, and timber.

The ruling below, however, threw the significance of this safeguard into serious doubt. It did so by upending the conventional understanding of VER clauses as protecting property rights. The D.C. Circuit determined that it would defer to OSM's conclusion that SMCRA's VER protects only "property-rights-*plus-permits*"—only those property rights on which the holder had also secured (or made a good faith effort to secure) permits *before* the affected land came within SMCRA's ambit.

OSM's "property-plus" interpretation of VER was unique; but the D.C. Circuit's analysis of OSM's regulation was as unprecedented as OSM's interpretation itself. Purporting to apply the methodology established in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court of appeals bestowed an expansive new measure of deference on agency interpretations of the statutes they administer by effectively deferring to the agency in determining *whether a statute is ambiguous*. Instead of deploying the familiar tools of statutory construction to unlock the meaning of the key statutory term—"valid existing rights"—the court declared it ambiguous, and the agency's interpretation deserving of

deference, because the lone word "rights" has various dictionary definitions. But just about *any* statutory phrase can be deemed "ambiguous" based on the definitional possibilities of the individual words it comprises. And this Court has made quite clear that statutory interpretation requires more than the isolated review of a single word of text, and that statutory ambiguity does not hinge on abstract definitional possibilities.

The D.C. Circuit's extreme brand of *Chevron* deference is not only in deep conflict with this Court's precedents; it raises significant constitutional doubts. OSM selected—and the court of appeals uncritically approved—an interpretation of SMCRA's VER clause that OSM forthrightly acknowledged would pose "significant takings implications." 64 Fed. Reg. 70,766, 70,781 (Dec. 17, 1999 final rule). But in approving OSM's interpretation, the D.C. Circuit expressly declined to apply the rule articulated by this Court in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 129 n.5 (1985), that an agency's statutory construction that threatens a taking should be construed narrowly to alleviate that concern. The court's decision not only conflicts with *Riverside Bayview Homes* itself; it exacerbates a rift among the circuit courts, which have long struggled to understand and apply the canon. The *Riverside Bayview Homes* rule now appears to be a dead letter in the D.C. Circuit; it is hard to imagine the circumstances in which the rule *would* apply, if not where OSM extensively catalogued the takings its preferred interpretation would cause, *and* where

courts, including this one, have recognized that SMCRA's VER clause does not compel that result.

The Court should grant certiorari to dispel the confusion the D.C. Circuit has introduced into the proper application of the *Chevron* methodology. And the Court should also undertake to provide the lower courts with needed guidance on the proper application of the *Riverside Bayview Homes* rule.

STATEMENT OF THE CASE

A. Factual Background

1. Enacted in 1977 after years of protracted debate, the Surface Mining Control and Reclamation Act (SMCRA or Act), Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201 *et seq.*), is a "comprehensive statute" that establishes a "nationwide program" to address surface coal mining. *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 268 (1981); *accord National Wildlife Fed'n* v. *Hodel*, 839 F.2d 694, 701 (D.C. Cir. 1988). That nationwide program provides for federal regulation of land-use activities that are traditionally under state and local control. *See Hodel*, 452 U.S. at 289 (explaining that "the Act * * * prescribes federal minimum standards governing surface coal mining, which a State may either implement itself or else yield to a federally administered regulatory program"); *id.* at 269-272 (outlining SMCRA provisions).

With the Act, Congress aimed to "strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy." 30 U.S.C. § 1202(f); *see also Citizens Coal Council* v. *Norton*,

330 F.3d 478, 480 (D.C. Cir. 2003). SMCRA thus promotes twin objectives: "protect society and the environment from the adverse effects of surface coal mining operations," 30 U.S.C. § 1202(a), and "assure that the coal supply essential to the Nation's energy requirements, and its economic and social well-being is provided," *id.* at § 1202(f).

Congress's careful balancing of these social and economic interests is most clearly evident in Section 522(e) of SMCRA. That provision designates a host of areas off-limits for surface–coal-mining operations. *See* 30 U.S.C. § 1272(e). But the provision also contains exemptions that serve SMCRA's second objective: preserving the availability of critical coal resources essential to our energy needs. *See id.* Section 522(e) exempts from the otherwise categorical ban on mining in statutorily designated areas two classes of property: existing mining operations and areas "subject to valid existing rights." *Id.*

2. Congress did not coin "valid existing rights" in SMCRA. It and the Executive have deployed VER clauses in well over 100 federal statutes and proclamations during the past century to protect rights in property from destruction by federal land-use enactments.[1] The United States Code is replete

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[1] *See* Jan G. Laitos, *The Nature & Consequence of "Valid Existing Rights" Status in Public Land Law*, 5 J. Min. L. & Pol'y 399, 403-406 & n.20 (1989) (noting that "[t]he VER phrase appears in over 100 federal statutes"); *see, e.g.*, Proclamation No. 7397, 66 Fed. Reg. 7354, 7356 (Jan. 22, 2001) (establishing Sonoran Desert National Monument "subject to valid existing rights"); Proclamation No. 6920, 61 Fed. Reg. 50,223, 50,225 (Sept. 18, 1996) (establishing Grand Staircase-Escalante National Monument "subject to valid existing rights"); Exec.

with statutes containing VER clauses.[2] They appear in Title 10 (Armed Forces),[3] Title 16 (Conservation),[4] Title 25 (Indians),[5] Title 30 (Mineral Lands and Mining),[6] Title 42 (The Public Health and Welfare),[7] Title 43 (Public Lands),[8] Title 45 (Railroads),[9] and Title 48 (Territories and Insular Possessions).[10] Included among these statutes are provisions governing the acquisition and use of lands under federal management[11] as well as withdrawing lands from private-sector development.[12]

Order No. 7624, 2 Fed. Reg. 1119, 1119 (May 29, 1937) (order enlarging Tongass National Forest "subject to valid existing rights").

[2] *See* App. 40a.

[3] *See* 10 U.S.C. § 7439(b).

[4] *See, e.g.*, 16 U.S.C. § 47e; *id.* § 80a; *id.* § 90; *id.* § 100c; *id.* § 410bb(c); *id.* § 410aaa-25; *id.* § 539(b); *id.* § 4308(d).

[5] *See, e.g.*, 25 U.S.C. § 293b; *id.* § 575; *id.* § 1780j(a)(1).

[6] *See, e.g.*, 30 U.S.C. § 1281.

[7] *See* 42 U.S.C. § 6502.

[8] *See, e.g.*, 43 U.S.C. § 1223; *id.* § 1610(a)(1); *id.* § 1633(c); *id.* at § 1785(c)(2)(A).

[9] *See, e.g.*, 45 U.S.C. § 1203(b)(1)(B); *id.* § 1210.

[10] *See, e.g.*, 48 U.S.C. § 1545(b)(2); *id.* § 1705(a); *id.* § 1971(a).

[11] *See, e.g.*, Federal Land Policy & Management Act of 1976, Pub. L. No. 94-579, § 701(h) (codified at 43 U.S.C. § 1701 note).

[12] *See, e.g.*, Note, *Regulation & Land Withdrawals: Defining "Valid Existing Rights,"* 3 J. Min. L. & Pol'y 517, 532 (1988) ("Although withdrawals have been numerous and have taken many forms, they invariably have contained language designed to protect existing rights acquired prior to the time of withdrawal. The specific language used has varied, but the

Not surprisingly given their proliferation in federal law, VER clauses impact a wide array of property owners, including diverse industries dependent on natural resources—from mineral and mining,[13] to oil and gas,[14] to forestry.[15] And irrespective of where they appear and what precise verbiage is used to describe the right they guard, VER clauses have been consistently understood to preserve the *status quo ante* by protecting property interests that otherwise would be adversely affected by subsequently enacted federal laws.[16]

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usual phrase preserves valid existing claims or valid existing rights.").

[13] *See, e.g.*, 16 U.S.C. § 460v-4; *id.* § 460q-5; *id.* § 460dd-2(a); *id.* § 460mm-1.

[14] *See, e.g.*, 16 U.S.C. § 460qq(c); *Colorado Envtl. Coal.* v. *Bureau of Land Mgmt.*, 932 F. Supp. 1247, 1249 (D. Colo. 1996) (VER clause in Federal Land Policy and Management Act protected existing gas leases).

[15] *See, e.g.*, 16 U.S.C. § 1604(i); *Forest Guardians* v. *Dombeck*, 131 F.3d 1309, 1312-13 (9th Cir. 1997).

[16] *See, e.g.*, *Seldovia Native Ass'n, Inc.* v. *Lujan*, 904 F.2d 1335, 1343 (9th Cir. 1990) (Alaska Native Claims Settlement Act's protection of "valid existing rights" included open-to-entry leases with conditional purchase options); *Northern Alaska Envtl. Ctr.* v. *Lujan*, 872 F.2d 901, 903 (9th Cir. 1989) (Alaska National Interests Lands Conservation Act's protection of "valid existing rights" included valid patented and unpatented mining claims); *Aleknagik Natives Ltd.* v. *United States*, 806 F.2d 924, 927 (9th Cir. 1986) (Alaska Native Claims Settlement Act's protection of "valid existing rights" included unvested property interests); *Hinton* v. *Udall*, 364 F.2d 676, 678-679 (D.C. Cir. 1966) (Interior Department Order No. 2874's protection of "valid existing rights" included subsurface property rights); *Stupak-Thrall* v. *Glickman*, 988 F. Supp. 1055, 1063-64 (W.D. Mich. 1997) (Michigan Wilderness Act's protection of "valid

Congress had the same purpose in mind when it protected "valid existing rights" from Section 522(e)'s otherwise *per se* ban on surface coal mining in statutorily designated areas. *See National Wildlife Fed'n*, 839 F.2d at 749 (Congress "limited the application of the surface mining proscriptions to avoid infringement of *existing property rights*." (emphasis added)); *see also id.* at 750 ("Congress did not intend to infringe on valid property rights or effect takings through § 522(e)."). As in other statutes, SMCRA's VER clause is intended to serve a fundamental purpose: to clarify that "*all valid existing property rights must be preserved*" and that Congress "has no intention whatsoever, by any provision of [SMCRA], to change such rights." S. Rep. No. 95-128, at 56 (1977) (emphasis added); *see* H.R. Rep. No. 95-218, at 95 (1977) ("As subsection 522(e) prohibits surface coal mining on lands within the boundaries of national forests, subject to valid existing rights, it is not the intent, nor is it the effect of this provision to preclude surface coal mining on private inholdings within national forests."). In reviewing a pre-enforcement challenge to the constitutionality of SMCRA, this Court similarly signaled as much. *See Hodel*, 452 U.S. at 297 n.37 (finding takings claim "premature" because statute protected "valid existing rights" and explaining that

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existing rights" included riparian rights); *Kile* v. *Belisle*, 759 P.2d 1292, 1298-1301 (Ala. 1988) (Public Land Order 5250's protection of "valid existing rights" included placer mining claims where there is substantial compliance with annual assessment requirements); *cf.* Louis J. Dobbs, 77 Interior Dec. 5, 8 (Jan. 15, 1970) (VER clauses "were designed to prevent the initiation of new claims and not the destruction of rights theretofore fairly earned").

a permit requirement "is not compelled by either the statutory language or its legislative history") (citing H.R. Rep. No. 95-218, at 95 (1977)).

3. Despite the long-standing conventional understanding of VER clauses, the agency charged with administering SMCRA—OSM—has struggled to implement the VER clause in Section 522(e). Since 1977, OSM has vacillated among alternative definitions for the statute's VER clause, only settling on its most recent interpretation in 1999—two decades after SMCRA was enacted. *See* 64 Fed. Reg. 70,766, 70,766 (Dec. 17, 1999 final rule) ("[A]t various times during the past two decades, we have either proposed or adopted all the listed alternative[definitions of Section 522(e)'s VER clause], plus some variations on these alternatives.").

In its latest regulatory incarnation of Section 522(e)'s VER clause, OSM required a miner seeking to demonstrate VER in a Section 522(e) area to satisfy a two-part test. The first part embodies what the phrase "valid existing rights" has traditionally meant: "a person claiming [VER] must demonstrate that a legally binding conveyance, lease, deed, contract, or other document vests the person, or a predecessor in interest, with the right to conduct the type of surface coal mining operations intended." 30 C.F.R. § 761.5(a). In other words, the miner must hold a valid property right to mine coal in the area before it was placed off limits under SMCRA. *See id.*

But OSM did not stop where the text of the statute stops. The second part of its VER test additionally requires a miner to prove that "[a]ll permits and other authorizations required to conduct surface coal mining operations had been obtained, or a good faith

effort to obtain all necessary permits and authorizations had been made, before the land came under the protection of" Section 522(e). *Id.* § 761.5(b)(1). Thus, while Section 522(e)'s VER clause says not a word about meeting permitting requirements attendant on surface-coal-mining operations in statutorily designated areas, OSM made that the critical element for establishing VER.[17] *See* 64 Fed. Reg. at 70,778. As OSM explained, its regulation means that VER is not "coextensive or synonymous with property rights"; to the contrary, property rights are a mere "prerequisite for demonstrating VER under the good faith/all permits" standard. *Id.* at 70,774. Section 522(e)'s VER clause therefore does not protect valid pre-existing property rights as so many of its statutory analogs do; it protects "equitable interest[s] in regulatory approval of proposed surface coal mining operations." *Id.* at 70,778.

In a lengthy preamble accompanying its regulations, OSM acknowledged the obvious implication of grafting a "good faith/all permits" plus-factor onto SMCRA's VER clause more than two decades after the statute became law: "[F]ew persons will qualify for VER under this standard." *Id.* OSM further recognized the upshot of adopting a test "few persons" could ever meet: its chosen

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[17] A miner may also demonstrate that "[t]he land is needed for and immediately adjacent to a surface coal mining operation" for which the miner had obtained (or made a good faith effort to obtain) all permits and other authorizations. 30 C.F.R. § 761.5(a)(b)(2). But SMCRA already exempts existing mining operations, which include adjacent lands as well as roads. *See* 30 U.S.C. § 1291(28)(B).

interpretation carried "significant takings implications." *Id.* at 70,781; *accord id.* at 70,827.

Quite right. In fact, of all the alternative VER definitions OSM considered in its rulemaking, the one it adopted had "the *greatest* potential to result in compensable takings." *Id.* at 70,781-82 (emphasis added). OSM also recognized why that was so: Its regulation upsets "underlying property interests" and interferes with "reasonable investment-backed expectations." *Id.* at 70,824. Indeed, while OSM acknowledged that the standard it adopted would prevent mining of thousands of acres in protected areas, *id.* at 70,776, its prediction underestimates the full takings impact of its regulation. OSM's new test will apply not only to areas currently designated under SMCRA but also to areas that later come within SMCRA's protections through future designations or third-party actions. *See National Wildlife Fed'n*, 839 F.2d at 750-751.

OSM fully appreciated that this grave constitutional consequence was in no way compelled by SMCRA, since "neither the statute nor its legislative history mentions a good faith/all permits standard for VER." 64 Fed. Reg. at 70,778. OSM even recognized that its interpretation of Section 522(e)'s VER clause deviated from Congress's historic use of the same term in many other federal statutes, which have been construed to protect pre-existing property rights from takings. *Id.* Yet OSM took the view that other statutes containing the same or substantively similar terms failed to provide any "useful guidance in determining the meaning of VER for surface coal mining operations under Section 522(e) of SMCRA." *Id.* at 70,794.

B. Proceedings Below

1. After OSM promulgated its "good faith/all permits" rule, NMA—whose members own or lease coal estates in areas protected under SMCRA—challenged the rule in the United States District Court for the District of Columbia. On cross-motions for summary judgment, the District Court granted judgment against NMA and in favor of the Secretary of the Interior. App. 36a. The District Court acknowledged that Congress intended in Section 522(e)'s VER clause "some recognition of applicable state law property rights and an avoidance of takings." App. 31a. It nevertheless found the term ambiguous, App. 32a, and concluded that OSM's interpretation was a permissible construction of the statute. App. 32a-34a.

2. The D.C. Circuit affirmed. App. 1a. Like the District Court, the court of appeals concluded that *Chevron* mandated deference to the Secretary's interpretation of Section 522(e)'s VER clause because it found the clause facially ambiguous. App. 2a. But the panel did not come to its conclusion about statutory ambiguity by applying the traditional tools of statutory construction—*i.e.*, text, structure, context, and purpose—that this Court has long required. App. 7a-11a. It took a far different route: Ignoring the other words that make up the critical statutory term, the other parts of SMCRA, and the other statutes containing the same or similar VER clauses, the court examined just one word—"rights"—and just one source—the dictionary. .

After examining how Black's Law Dictionary treats the word "rights," the court of appeals held that Section 522(e)'s use of the word "rights" constituted a

"major source * * * of ambiguity." App. 8a. Thus, the D.C. Circuit opined that while "rights" may refer to property rights in some circumstances, Congress had used "a word with multiple and often vague meanings" that "will also do service more generally," meaning in turn that "[t]he dictionary counsels in favor of more deference to the agency, not less." App. 9a. While recognizing that the term "valid existing rights" may well "operate[ ]" as a "term of art," the court explained that the term is "a tool by which Congress delegates policymaking authority through ambiguity." App. 10a. With this holding, the panel announced a new and troubling rule: *Chevron* step two is triggered whenever one word in a statute is superficially ambiguous based on its dictionary definitions.

Having found SMCRA's VER clause ambiguous because the word "rights" in isolation is susceptible to various dictionary meanings, the panel found the Secretary's interpretation of the statute reasonable under *Chevron* step two. App. 11a-16a. This is the point at which the court made its second mistake. The court declined to adopt a narrowing construction of OSM's statutory interpretation under *Riverside Bayview Homes* based on its manifest takings implications. App. 15a-16a. The panel agreed in theory that "the canon of constitutional avoidance can[not] be ignored with respect to every argument sounding in the Takings Clause"—but nevertheless concluded that no such issues were raised in this case, because "NMA has shown no 'identifiable class' of miners whose takings claims would expose the Treasury to such liability." App. 16a. The court

therefore applied the "usual *Chevron* analysis" and deferred to the Secretary's interpretation.

NMA timely petitioned for rehearing and rehearing *en banc*. The D.C. Circuit denied both requests. App. 37a-38a.

REASONS FOR GRANTING THE WRIT

I. THE RULING BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS.

1. The D.C. Circuit deferred to the Secretary's interpretation of SMCRA's "valid existing rights" clause because a single word in that key phrase—"rights"—has multiple entries in the dictionary. With that unique approach to statutory interpretation under *Chevron*, the D.C. Circuit effectively enshrined a new measure of deference in the interpretative process where none had previously existed and where none properly belongs—*i.e.*, in determining whether a statute *is* ambiguous in the first place. App. 7a-11a. An interpretative approach that focuses exclusively on abstract definitional possibilities as the touchstone of statutory ambiguity can be expected to produce a delegation of authority to the agency in just about every case. Not only does that approach squarely conflict with *Chevron*, but it also poses grave separation-of-powers concerns by allowing Executive Branch agencies to trump Congress's otherwise clear intent. That is why this Court has held time and again that "deference to [an agency's] statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 600 (2004); *see Adams*

Fruit Co. v. *Barrett*, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority."). The panel's key supposition—that the isolation and sterile examination of one word in a statute can trigger statutory ambiguity sufficient to constitute a delegation of lawmaking authority to an administrative agency—thus stands in sharp conflict with this Court's teachings.

To begin with, neither this Court's precedents nor common sense allow *any* statutory interpretation to hinge exclusively on the isolated review of a single word contained in the statute that has various definitions in common usage. *See Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) ("[A] word is known by the company it keeps."). As this Court has explained, " '[w]ords are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used[.]' " *Shell Oil Co.* v. *Iowa Dep't of Revenue*, 488 U.S. 19, 25 n.6 (1988) (quoting *NLRB* v. *Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (Hand, J.)). For that basic reason, this Court has sensibly held that "statutory language cannot be construed in a vacuum"; instead, "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989); *see also Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and

the broader context of the statute as a whole."); *King* v. *St. Vincent Hosp.*, 502 U.S. 215, 221 (1991) ("[T]he meaning of statutory language, plain or not, depends on context.").

This Court has repeatedly put to practice this conventional approach to statutory interpretation, and did so again recently. In *Dolan* v. *United States Postal Serv.*, 546 U.S. 481 (2006), the Court considered whether the Federal Tort Claims Act's postal exception for the "negligent transmission" of mail preserved sovereign immunity for injuries caused by the Postal Service's creation of slip-and-fall hazards by the careless delivery of mail. *Id.* at 486. The Court recognized that, "[i]f considered in isolation," the phrase "negligent transmission" could "embrace a wide range of negligent acts committed by the Postal Service in the course of delivering mail." *Id.* But "[t]he definition of words in isolation * * * is not necessarily controlling in statutory construction," the Court explained, because "[a] word in a statute may or may not extend to the outer limits of its definitional possibilities" depending upon the interpretation of "the whole statutory text, considering the purpose and context of the statute." *Id.* "[N]egligent transmission" did not extend to its definitional limit; the other statutory terms surrounding it constrained its meaning, such that the phrase was more properly interpreted to extend only to injuries arising because mail does not arrive or arrives late, arrives in damaged condition, or at the wrong address. *Id.* at 486-489.

The ruling below cannot be reconciled with *Dolan*. The D.C. Circuit made no attempt to understand the meaning of the word "rights" in the context in which

it was used—*i.e.*, as part of a statutory term of art with a century-old pedigree—or even by reference to the other words surrounding it—*i.e.*, "valid" and "existing." Instead, the court's statutory analysis was entirely "control[ed]" by the existence of multiple dictionary definitions for one word in the statute without any regard for "the whole statutory text." *Id.* at 486. *Dolan* would thus likely have come out differently under the panel's approach: under the D.C. Circuit's test, the Postal Service's creation of a slip-and-fall hazard would constitute the "negligent transmission" of mail for which sovereign immunity is preserved because that phrase in theory can "embrace a wide range of negligent acts." *Id.*

This Court has likewise emphasized that *Chevron* step one requires more than an open-ended hunt for definitional possibilities. *See National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007) ("In making the threshold determination under *Chevron*, a reviewing court should not confine itself to examining a particular statutory provision in isolation.") (internal citation & quotation marks omitted). A statute is only deemed ambiguous under *Chevron* after the traditional tools of statutory construction—text, structure, purpose, and context—have been applied and exhausted. *See, e.g.*, *Chevron*, 467 U.S. at 843 n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

This Court has repeatedly deployed the familiar tools of statutory interpretation to dispel facial statutory ambiguity and to reject administrative

agency constructions inconsistent with plain statutory commands. *See Food & Drug Admin.* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (examining Food and Drug Act's text, structure, purpose and history of tobacco legislation and holding FDA barred from regulating cigarettes as "drug" and "device" under *Chevron* step one); *MCI Telecomms. Corp.* v. *AT&T Co.*, 512 U.S. 218, 228 (1994) (applying text and structure to Communications Act and rejecting FCC's construction of "modify" under *Chevron* step one).[18] Take, for one classic example, *Brown* v. *Gardner*, 513 U.S. 115 (1994). In that case, the Court reviewed a Department of Veteran Affairs regulation "requiring a claimant for certain veterans' benefits to prove that disability resulted from negligent treatment by the VA" and ultimately held that it was inconsistent with the controlling statute, which states that the VA will provide disability benefits for an injury that results from VA medical treatment so long as it did not result from the "veteran's own willful misconduct." *Id.* at 116. While the Court recognized that the underlying statute's use of the term "injury" "can of course carry a fault connotation" in common usage, it reasoned that statutory "[a]mbiguity is a creature not of definitional possibilities but of statutory context." *Id.* at 117-118. And after closely reviewing the statutory context as well as "[t]extual cross-reference[s]" to other veterans' benefits statutes and "analogous statutes dealing with

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[18] *See, e.g., Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 42-43 (1990) ("Because we find that the statute, as a whole, clearly expresses Congress' intention, we decline to defer to OMB's interpretation.").

service-connected injuries" employing the word "injury," the Court held that the statute "negate[d] a fault reading." *Id.* at 118-119. The Court therefore held that because "the text and reasonable inferences from it give a clear answer," that "is the end of the matter"—the regulation could not stand. *Id.* at 120.

Notwithstanding the Court's holding in *Brown* that mere "definitional possibilities" do not give rise to statutory ambiguity under *Chevron*, the D.C. Circuit deferred to OSM's interpretation of Section 522(e)'s VER clause *precisely because* the word "rights" admits of multiple "definitional possibilities." The result in *Brown*, just like the result in *Dolan*, would thus have been different under the D.C. Circuit's rule: Deference would have been given to the VA's regulation simply because "injury," standing alone, has multiple definitions. There would have been no need to enlist the aid of any statutory construction tools to test the statute's meaning—and no resolution of the issue at *Chevron* step one.

2. Trading venerable tools of statutory construction for heightened agency deference based on dictionary construction also led the court of appeals to dismiss Congress's long track record with VER clauses like the one in Section 522(e). *See supra* at 6-8. Rather than examine that phrase's rich history and recognize that both Congress and property owners have relied on VER's settled meaning, the D.C. Circuit got its rules of construction backwards. According to the court of appeals, a "term of art" like "valid existing rights" is merely "a tool by which Congress delegates policymaking authority through ambiguity." App. 10a. This proposition—that the more Congress uses a term, the less settled its

meaning becomes—appears to have no known provenance (aside, perhaps, from Lewis Carroll). And for good reason: It inverts this Court's presumption that "when Congress uses the same language in two statutes having similar purposes * * * it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith* v. *City of Jackson*, 544 U.S. 228, 233 (2005) (plurality); *see McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 342 (1991) (when a statute uses a term of art, "Congress intended it to have its established meaning"); *Hawaiian Airlines, Inc.* v. *Norris*, 512 U.S. 246, 254 (1994); *Gilbert* v. *United States*, 370 U.S. 650, 658 (1962); *Morissette* v. *United States*, 342 U.S. 246, 263 (1952).[19]

Applying this presumption, this Court frequently looks to Congress's record of statutory usage for assistance in interpreting common statutory terms.[20]

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[19] *See generally* 2B Norman J. Singer, *Sutherland Statutory Construction* § 51:2 (7th ed. 2008) ("It is assumed that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter. * * * [T]he new provision is presumed in accord with the legislative policy embodied in those prior statutes."); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.").

[20] *See, e.g., Bragdon* v. *Abbott*, 524 U.S. 624, 631 (1998) (noting "ADA's definition of disability is drawn almost verbatim from the definition of 'handicapped individual' included in the Rehabilitation Act"); *Independent Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 754, 759 n.2 (1989) ("We have stated in the past that fee-shifting statutes' similar language is 'a strong

In *McDermott*, for example, the Court explained that, while the Jones Act did not define the term "seaman," the term is a "maritime term of art" with a recognized meaning. 498 U.S. at 342. Similarly, in *West Virginia University Hospitals, Inc.* v. *Casey*, 499 U.S. 83 (1991), the Court held that the allowance of "a reasonable attorney's fee" under the version of the fee-shifting statute for civil-rights litigation then in effect did not encompass fees paid to experts because Congress's "record of statutory usage demonstrates convincingly that attorney's fees and expert fees are regarded as separate elements of litigation cost." *Id.* at 88. And in *United States Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474 (1932), the Court explained that because the federal Shipping Act, "[i]n its general scope and purpose, as well as in its terms, * * * closely parallels the Interstate Commerce Act, * * * we cannot escape the conclusion that Congress intended that the two acts, each in its own field, should have like interpretation, application, and effect." *Id.* at 481.

The D.C. Circuit's holding that a century's worth of VER clauses protecting property rights in more than 100 federal statutes actually makes the term "valid existing rights" *more*, not *less*, opaque cannot be squared with cases like *McDermott*, *Casey*, and *United States Navigation Co.* But even beyond that difficulty, the D.C. Circuit's new approach—that Congress's consistent use of a term opens it up to varying meanings based on shifting agency prerogatives—is profoundly troubling on its own

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indication' that they are to be interpreted alike.") (citation omitted).

terms: It effectively compels a court to defer to an agency's interpretative gloss *precisely because* Congress has endeavored to fix the statute's meaning through repeated and consistent use of the same words in the same way. That will undoubtedly cause serious mischief where, as here, an agency administers different statutory schemes that use the same or similar terms. *See, e.g., Environmental Action, Inc.* v. *FERC*, 939 F.2d 1057, 1063 (D.C. Cir. 1991) ("Without more support, and a distinction that justifies the seemingly different approaches that the FERC has taken under two very similar statutes [*i.e.*, the Natural Gas Act and the Federal Power Act], we cannot accept" FERC's conflicting interpretations of two similar provisions). Indeed, because some of the lands designated under Section 522(e) are created or governed under federal laws containing their *own* VER clauses,[21] the D.C. Circuit's approach (and OSM's interpretation) is sure to sow confusion as to which, if any, "valid existing rights" are protected under statutes intended to work together.

3. With its singular attention to the meaning of the word "rights" in the statute, and the new measure of deference that approach afforded, the D.C. Circuit disregarded another essential source of congressional intent: SMCRA's structure. The result was to put yet more distance between the rule adopted by the court of appeals and this Court's precedents. Thus, the D.C. Circuit did not stop to consider the sharp incongruity between OSM's "good faith/all permits"

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[21] *See* 30 U.S.C. § 1272(e)(1); 16 U.S.C. § 1133(d)(3); *id.* § 1280(a)(ii)-(iii) & (b).

plus-factor and the other provisions of SMCRA requiring one with VER to obtain all necessary regulatory permits before mining. *See* 30 U.S.C. §§ 1256-1266 (establishing permit process, requirements, and performance standards); 64 Fed. Reg. at 70,771 & 70,776-77. The fact that Congress elsewhere in the Act required miners *with VER* to *obtain permits* before mining strongly signals that the legislature did not intend to require miners to obtain those same permits to *qualify* for VER in the first place.

Where Congress sought to condition exemptions from SMCRA on the attainment of regulatory permits, moreover, it affirmatively said so. *See* 30 U.S.C. § 1260(b)(5)(B); *id.* § 1260(d)(2); *id.* § 1272(a)(6). Thus, SMCRA exempts from its restrictions on mining operations that adversely impact alluvial valley floors those operations that "had obtained specific permit approval by the State regulatory authority to conduct surface coal mining operations within said alluvial valley floors" one year before SMCRA's enactment. *Id.* § 1260(b)(5)(B). The Act similarly exempts from its restrictions on mining operations in areas containing prime farmland those operations permitted before SMCRA's enactment. *See id.* § 1260(d)(2).

The D.C. Circuit wholly disregarded these telling structural features of SMCRA, effectively announcing that a statute's structure need not be consulted to interpret it. But this Court has always required courts to read statutory provisions together to glean their meaning. *See, e.g., Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (noting "longstanding practice of construing statutes

in pari materia"); *Riverside Bayview Homes*, 474 U.S. at 139 n.11 (explaining that "various provisions of the [Clean Water] Act should be read *in pari materia*"). And while the D.C. Circuit considered it unnecessary to draw any inference from the fact that Congress excluded particular language in one section of a statute that it included in other sections of the same statute, this Court has long held just the opposite. *See, e.g.*, *KP Permanent Make-Up, Inc.* v. *Lasting Impression I, Inc.*, 543 U.S. 111, 118 (2004) (" '[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' ") (quoting & citing *Russello* v. *United States*, 464 U.S. 16, 23 (1983)). This Court requires courts to pay attention to statutory structure. The court of appeals disregarded that important constraint on an agency's interpretative choices.

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The D.C. Circuit's novel approach to *Chevron* has introduced new and troubling uncertainty into the traditional understanding of a statutory term of art used in many federal statutes. Given the sheer number of agency interpretations the D.C. Circuit reviews each year, its newly minted rule of decision is also sure to do yet more harm if it takes hold. The Court should grant certiorari to clarify that it is Congress—not the Executive Branch—whose intent alone matters at *Chevron* step one. S. Ct. Rule 10(c).

II. BY REJECTING *RIVERSIDE BAYVIEW HOMES'* CONSTITUTIONAL AVOIDANCE RULE, THE RULING BELOW TRIGGERS A CIRCUIT SPLIT AND INJECTS FURTHER UNCERTAINTY INTO THE RULE'S PROPER APPLICATION.

The decision below also injects needless confusion into another settled rule: that agency interpretations that threaten takings should be judicially narrowed to avoid constitutional difficulties.

It has long been the rule that courts do not owe the customary *Chevron* deference to an agency's statutory interpretation that raises serious constitutional difficulties. *See Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575-576 (1988) (citing *NLRB* v. *Catholic Bishop of Chi.*, 440 U.S. 490, 499-501 (1979)); *Rust* v. *Sullivan*, 500 U.S. 173, 190-191 (1991). As this Court has explained, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems." *Edward J. DeBartolo Corp.*, 485 U.S. at 575; *see id.* (rejecting agency interpretation that "pose[d] serious questions of the validity [of the statute] under the First Amendment").

This principle of constitutional avoidance is particularly appropriate when an agency's interpretation threatens to take private property. Thus, in *Riverside Bayview Homes*, this Court explained that a statute should be given a narrowing construction where "it appears that there is an

identifiable class of cases in which application of [the] statute will necessarily constitute a taking." 474 U.S. at 129 n.5. The Court drew this rule from one of its earlier cases—*United States* v. *Security Industrial Bank*, 459 U.S. 70 (1982)—where it avoided "a substantial argument" that the retroactive application of a Bankruptcy Code provision would cause takings by "construing the statute to apply only prospectively." 474 U.S. at 129 n.5. As the Court explained there, this limiting approach is a "sensible" one to follow in cases that present substantial takings arguments. *See id.* But the Court nevertheless declined to follow that approach in the case before it because it determined that "there is no identifiable set of instances in which mere application of the [challenged] permit requirement will necessarily or even probably constitute a taking." *Id.*

A. The Lower Courts Are Confused About How To Apply *Riverside Bayview Homes*' Constitutional Avoidance Rule.

In the years since the Court announced the constitutional-avoidance rule for takings cases, the lower courts have struggled to understand and apply it. Four courts of appeals have addressed the *Riverside Bayview Homes* takings rule—the Fifth Circuit, the Eighth Circuit, the Federal Circuit and the D.C. Circuit—and each has adopted differing views of it.

The Fifth Circuit. In *Texas Office of Public Utility Counsel* v. *FCC*, 183 F.3d 393 (5th Cir. 1999), petitioners alleged that the timetable adopted by the Federal Communications Commission for implementing its support system to ensure universal

telephone service worked a taking and that "the FCC should adopt a narrow construction of the statutory language to avoid any constitutional infirmities." *Id.* at 437. While the Fifth Circuit recognized that *Riverside Bayview Homes* requires narrowing constructions in some circumstances, it ultimately declined to adopt such a construction based on the likely practical effect of the regulation: "[e]ven if" the petitioners could show "that some taking will result," the court of appeals concluded, petitioners could not demonstrate "that the[ir] losses are so significant that the 'net effect' is confiscatory." *Id.* The court's holding thus seems to have rested on the conclusion that the FCC's timetable worked no taking. *See id.* No similar conclusion, of course, can be reached here.

The Eighth Circuit. In *Iowa Utilities Bd.* v. *FCC*, 219 F.3d 744 (8th Cir. 2000), *rev'd in part on other grounds sub nom. Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467 (2002), petitioners argued that the forward-looking pricing methodology for interconnection and unbundled telecommunications network elements the FCC adopted under the Telecommunications Act of 1996—known as TELRIC—"raise[d] a serious Fifth Amendment takings issue that the statute should be construed to avoid." *Id.* at 753. Applying *Riverside Bayview Homes*, however, the court of appeals concluded that "[w]e do not need to disregard *Chevron* deference and interpret the statute * * * to avoid an unconstitutional taking in this instance" because "[t]he possibility that a regulatory program may result in a taking does not justify the use of a narrowing construction." *Id.* at 754. The operative

word there was "may"; TELRIC's impact could not be known until it was actually implemented, and there accordingly could be no class of takings claims until the methodology was used to set actual rates. *See Iowa Utils. Bd.*, 219 F.3d at 754. No such uncertainty, of course, exists here.

The Federal Circuit. In *Florida Rock Indus., Inc.* v. *United States*, 791 F.2d 893 (Fed. Cir. 1986), Florida Rock, "a large-scale miner of limestone," alleged that a large tract of land containing limestone deposits was taken when the Army engineers denied it a Clean Water Act permit to discharge dredged materials into wetlands. *Id.* at 895. Reviewing the claims court's award of damages to Florida Rock, the Federal Circuit, relying upon *Riverside Bayview Homes*, explained that, even if a constitutional violation "occurred here in the form of a taking without just compensation," "a more cautious construction of the Clean Water Act is not legally required." *Id.* at 900. The reason was the clear availability of compensation for this particular taking under the Tucker Act. *See id.* (explaining if a taking "occurred here * * * it is cured by the Tucker Act").

The D.C. Circuit. In contrast with these Circuits, which have accepted the *Riverside Bayview Homes* canon but found it inapplicable in the particular factual contexts in which it has been invoked, the D.C. Circuit has applied the rule on multiple occasions and even enforced it. *See Building Owners & Managers Ass'n Int'l* v. *FCC*, 254 F.3d 89, 99-100 (D.C. Cir. 2001); *Transmission Access Policy Study Group* v. *FERC*, 225 F.3d 667, 690 (D.C. Cir. 2000), *aff'd sub nom. New York* v. *FERC*, 535 U.S. 1 (2002);

National Mining Ass'n v. *Babbitt*, 172 F.3d 906, 917 (D.C. Cir. 1999); *Bell Atl. Tel. Cos.* v. *FCC*, 24 F.3d 1441, 1445-47 (D.C. Cir. 1994); *Railway Labor Executives' Ass'n* v. *United States*, 987 F.2d 806, 816 (D.C. Cir. 1993); *see also GTE Serv. Corp.* v. *FCC*, 205 F.3d 416, 423 (D.C. Cir. 2000) (recognizing "a broader construction of 'necessary' under § 251(c)(6) might result in an *unnecessary* taking of private property") (emphasis in original).[22]

The D.C. Circuit gave the fullest exposition of the *Riverside Bayview Homes* rule in *Bell Atlantic*, a case in which local exchange carriers challenged the FCC's authority to require them to permit competitive carriers to physically co-locate facilities within their central offices. The *Bell Atlantic* court explained that the constitutional-avoidance rule derived from the Constitution's structural separation of powers: "Where administrative interpretation of a statute creates" an identifiable class of takings claims, the "use of a narrowing construction prevents executive encroachment on Congress's exclusive powers to raise revenue." 24 F.3d at 1445. Otherwise, executive-branch agencies could "use statutory silence or ambiguity to expose the Treasury to liability both massive and unforeseen." *Id.* Bearing these concerns in mind, the *Bell Atlantic* court went on to impose a narrowing construction on the regulation in question there: The FCC could not

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[22] Given the heavy volume of agency statutory interpretations the D.C. Circuit is called on to review, it is unsurprising that that court has amassed the most experience with the *Riverside Bayview Homes* rule. By the same token, the D.C. Circuit's sudden rejection of the rule is likely to have the greatest impact on future agency interpretations.

impose a physical co-location requirement because it "create[d] an 'identifiable class' of applications that would seem to constitute a taking." *Id.* at 1446.

B. The Ruling Below Exacerbates The Confusion In The Lower Courts By Causing A Circuit Split.

In a sharp—but unexplained—break with its own precedent, as well as with that of the other Circuits that have recognized the validity of the *Riverside Bayview Homes* rule (if not how or when to apply it), the court below effectively rendered this strain of the constitutional-avoidance canon a dead letter. Recall that OSM itself acknowledged that its regulation carried "significant takings implications" and even went so far as to point out that its VER standard would prevent mining initially in thousands more acres subject to valid mining rights than would otherwise be allowed under a different standard. *See* 64 Fed. Reg. at 70,776, 70,778. Yet the D.C. Circuit nonetheless concluded that *Riverside Bayview Homes* did not come into play because NMA failed to present sufficient "evidence" that OSM's regulation created an "identifiable class" of takings claims. App. 16a. The D.C. Circuit's assertion that no "evidence suggest[ed]" that compensable takings will follow on OSM's regulation is strange indeed, given that OSM acknowledged throughout its preamble the "significant" takings implications of its own regulation. *See* 64 Fed. Reg. at 70,777, 70,781, 70,824, 70,827. And there simply can be no doubt that OSM's "good faith/all permits" plus-factor creates an identifiable class of takings cases; OSM said so. Nor does it take much to discern the class. The "identifiable class" consists of miners with valid

property rights to surface mine coal estates in a protected area who did not secure (or make a good faith effort to secure) all permits or authorizations before the area came under SMCRA's protections. *See* 30 C.F.R. § 761.5; 64 Fed. Reg. at 70,824. And the number of acres impacted by OSM's statutorily impermissible plus-factor will only increase as additional areas come within Section 522(e)'s protections. *See supra* at 12. *Riverside Bayview Homes* requires nothing more; the narrowing construction there was occasioned by "a substantial argument"—not evidence.

Even more troubling than the D.C. Circuit's blithe disregard of the obvious class of takings claims sparked by OSM's regulation is its disregard of earlier cases recognizing that Section 522(e)'s VER clause is intended to *prevent* takings—not facilitate them. *See Hodel*, 452 U.S. at 297 n.37 (explaining that takings challenge was "premature" because "522(e)'s restrictions are expressly made subject to 'valid existing rights' "); *National Wildlife Fed'n*, 839 F.2d at 749-750 ("Congress * * * limited the application of the surface mining proscriptions to avoid infringement of existing property rights" and "did not intend to * * * effect takings through § 522(e)"). If ever there were occasion to adopt a narrowing construction of an agency regulation to avoid the takings difficulties caused by an agency's chosen interpretation, it must be where (as here) the agency selected a discretionary interpretation it admitted carried the "greatest potential to result in compensable takings," 64 Fed. Reg. at 70,781-82, and where (as here) courts have previously recognized that Congress sought to avoid that very result in

protecting "valid existing rights" in the first place. If the *Riverside Bayview Homes* rule does not have any force in that circumstance, there is no such rule.

* * *

The decision below thus exacerbates the confusion in the lower courts (including even within the D.C. Circuit itself) concerning the proper interpretation and application of the *Riverside Bayview Homes* rule of constitutional avoidance. This Court should take this opportunity to provide guidance to the lower courts by clarifying when—if ever—statutes that threaten takings should receive narrowing interpretive constructions. S. Ct. Rule 10(a).

III. THIS CASE PRESENTS AN IDEAL VEHICLE TO ADDRESS A QUESTION OF SIGNIFICANT NATIONAL IMPORTANCE.

SMCRA is one of more than 100 federal statutes and proclamations that protect "valid existing rights." *See supra* at 6-7; App. E. These provisions collectively affect a diverse group of property owners dependent upon natural resources, including—but by no means limited to—the coal mining industry. *See supra* at 7-8. And these provisions have traditionally been understood to protect pre-existing property rights from destruction by subsequently enacted federal laws. *See supra* at 7-8.

The ruling below directly challenges that conventional understanding by holding that Section 522(e)'s VER clause protects "equitable interests in regulatory approval[s]," not property interests. *See supra* at 8. That move, made possible only through a novel interpretative mode out of step with this

Court's instructions, carries serious consequences. It casts grave doubt on the proper interpretation of a familiar term of art that Congress has used in numerous statutes scattered throughout the United States Code. *See* App. E. It unsettles what had been settled past interpretations of VER clauses. And its interpretation is sure to inform future agency and judicial interpretations of other VER clauses in other federal statutes and proclamations. The D.C. Circuit's VER ruling thus has far-reaching implications for all industries that invest in property rights to extract valuable resources from the land.

This Court in the past has recognized the substantial national significance of SMCRA's regime—and of the takings consequences that potentially attend it. When this Court considered a pre-enforcement challenge to SMCRA's constitutionality in 1981, it found a takings challenge to Section 522(e) "premature" in part because the statute's "restrictions are expressly made subject to 'valid existing rights.'" *Hodel*, 452 U.S. at 296 n.37. The Court also at that time rejected the appellees' contention, based on a 1980 regulation that the district court had remanded to the Secretary for reconsideration, that Section 522(e)'s VER clause "applies only to specific surface mining operations for which all required permits were issued prior to August 3, 1977, the effective date of the Act," explaining that "[t]his interpretation of the exception is not compelled by either the statutory language or its legislative history." *Id.* Now that the Secretary, after wavering for nearly a quarter of a century, has indeed interpreted Section 522(e)'s "valid existing rights" clause to contain a

"good faith/all permits" plus-factor, the propriety of that interpretation is squarely presented to this Court.

This Court should take the opportunity now to review OSM's interpretation, because the chance may not come again. The D.C. Circuit is the exclusive venue in which national rules and regulations promulgated by the Secretary—such as the one at issue here—may be challenged. *See* 30 U.S.C. § 1276(a)(1) ("Any action by the Secretary promulgating national rules or regulations * * * shall be subject to judicial review in the United States District Court for the District of Columbia Circuit."). And because national regulations must be challenged within 60 days, the legality of the Secretary's VER rule cannot be contested later as applied in a particular case. *See id.* ("A petition for review of any action subject to judicial review under this subsection shall be filed in the appropriate Court within sixty days from the date of such action * * * ."); *see also Commonwealth of Va. ex rel. Va. Dep't of Conservation & Econ. Dev.* v. *Watt*, 741 F.2d 37, 41 (4th Cir. 1984) (rejecting as "clearly subvert[ing] Congressional intent" the view that "those opposed to a national regulation could simply ignore the sixty-day statutory time limit prescribed for bringing an action in the District of Columbia and obtain relief later in their local jurisdiction"). A split in lower court authority therefore is unlikely to emerge. And there accordingly is nothing to be gained by allowing the issue to further percolate in the lower courts.

There are no impediments, procedural or otherwise, that would complicate this Court's

consideration of the proper construction of Section 522(e)'s VER clause. NMA squarely challenged OSM's interpretation of Section 522(e)'s VER clause below in the agency, at the District Court, and in the D.C. Circuit, and the court of appeals resolved NMA's challenge on the merits.

This Court should act to provide the lower courts with needed guidance on the correct meaning of this important statutory term.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A
UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 24, 2007

Decided January 15, 2008

No. 06-5199

NATIONAL MINING ASSOCIATION,
APPELLANT

v.

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 00cv00283)

Kirsten L. Nathanson argued the cause for appellant. With her on the briefs were *Harold P. Quinn, Jr.* and *Thomas C. Means*. *Joseph M. Klise* entered an appearance.

Blair M. Gardner was on the brief for amicus curiae National Council of Coal Lessors, Inc. in support of appellant.

Kathryn E. Kovacs, Attorney, U.S. Department of Justice, argued the cause for federal appellees. With

her on the brief was *Robert Oakley*, Attorney.

Walton D. Morris, Jr. was on the brief for appellee Kentucky Resources Council, Inc.

Before: GARLAND and GRIFFITH, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* GRIFFITH.

GRIFFITH, *Circuit Judge*

The Secretary of the Interior has interpreted the phrase "valid existing rights" in the Surface Mining Control and Reclamation Act to foreclose surface mining operations in sensitive areas. The National Mining Association challenges this reading of the statute, but we conclude that we must defer to the Secretary's reasonable interpretation of this ambiguous phrase.

I.

In 1977, Congress enacted the Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. §§ 1201 *et seq.*, "to protect society and the environment from the adverse effects of surface coal mining operations," *id.* § 1202(a). Section 522(b) of the SMCRA authorizes the Secretary of the Interior ("Secretary") to prohibit surface coal mining operations on federal lands if he determines them to be unsuitable for that purpose. *Id.* § 1272(b). Section 522(e) bans outright surface mining in statutorily designated areas.[1] *Id.* § 1272(e). In this appeal, we

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[1] Subject to certain exceptions, § 522(e) designates the following areas: lands within the National Park System, the National Wildlife Refuge Systems, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System; federal lands within a national

are asked to determine how Congress intended that ban to work. The relevant text of § 522(e) provides: "After August 3, 1977, and subject to *valid existing rights* no surface coal mining operations except those which exist on August 3, 1977, shall be permitted [in the statutorily designated areas]." *Id.* (emphasis added).

Because one must show "valid existing rights" ("VER") to start a surface mining operation in a § 522(e) area, the meaning of the phrase is critical. For decades, the Secretary and the courts have wrestled with how best to understand VER and determine what it protects. We need not recount this history. Suffice it to say that VER has occasioned a spectrum of agency interpretations, ranging from a relaxed "ownership and authority" standard, which required only that the miner show a property right in the coal, to a more exacting "all permits" standard, which called for a showing that surface mining licenses had been issued prior to the date § 522(e) took effect. *See* Valid Existing Rights, 64 Fed. Reg. 70,766, 70,769–71 (Dec. 17, 1999) (recounting Secretary's prior definitions of VER).

In 1999, the Secretary and the Office of Surface Mining Reclamation and Enforcement promulgated a rule through notice-and-comment procedures offering yet another interpretation of VER. *Id.* at 70,831–32 (codified at 30 C.F.R. § 761.5). This "1999 Rule," as we will call it, was a setback for parties hoping to conduct new surface mining operations in § 522(e) areas. Under the 1999 Rule, a miner claiming VER

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forest; areas that would adversely affect public parks or places included in the National Register of Historic Sites; areas within one hundred feet of the outside right-of-way line of any public road; and areas within three hundred feet of any occupied dwelling, public building, school, church, community, or institutional building, or within one hundred feet of a cemetery. *See* 30 U.S.C. § 1272(e).

protection must satisfy two conditions. First, he must produce a legally binding document that vested him with the right to mine the land at the time it came under § 522(e). Second, he must either prove that the owner of the land, by the time it came under § 522(e), had made a good faith effort to obtain all necessary permits for the mining, or else prove that the coal is immediately adjacent to a surface mining operation in existence on August 3, 1977 and is needed to ensure the economic viability of the mining operation as a whole. The Secretary prefaced this interpretation of VER with a 72-page preamble describing the agency's long relationship with the phrase, explaining the rationale for the latest interpretation, and responding to objections raised during the notice-and-comment period. Significantly, the preamble acknowledges that the chosen VER interpretation protects 3,062 more acres than the least restrictive alternative and predicts that "few persons will qualify for VER under this standard." Valid Existing Rights, 64 Fed. Reg. 70,766, 70,776, 70,778 (Dec. 17, 1999).

The National Mining Association ("NMA"), an industry trade association with standing to bring suit on behalf of its members under *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), challenged the 1999 Rule pursuant to 30 U.S.C. § 1276(a)(1) in the United States District Court for the District of Columbia. The NMA argued that the 1999 Rule's interpretation of VER was too narrow and shielded more land from surface mining than Congress intended. On cross-motions for summary judgment, the district court found the statute ambiguous, deferred to the Secretary's interpretation as reasonable, and entered judgment for the Secretary. *Nat'l Mining Ass'n v. Scarlett*, 2006 WL 1194224, *6–9 (D.D.C. May 4, 2006) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). The NMA

appeals. For the reasons set forth below, we affirm the district court's judgment.

II.

This case begins with an unusual question created by a mistake in the language of the jurisdictional grant. We have an "independent obligation to determine whether subject-matter jurisdiction exists," *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006), which we must discharge before ruling on the merits, *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 127 S. Ct. 1184, 1191 (2007) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–102 (1998)).

The district court claimed jurisdiction under 30 U.S.C. § 1276(a)(1), which renders "[a]ny action by the Secretary promulgating national rules or regulations . . . subject to judicial review in the United States District Court for the District of Columbia Circuit." But there is no such court within the federal judiciary. The judgment the NMA has asked us to review comes from a court called "the United States District Court for the District of Columbia." *See* Act of June 25, 1948, ch. 646, 62 Stat. 869, 875, 895 (codified at 28 U.S.C. §§ 88, 132(a)); *see also In re Permanent Surface Mining Regulation Litig.*, 653 F.2d 514, 516 n.2 (D.C. Cir. 1981) (noting § 1276(a)(1)'s error); *In re Surface Mining Regulation Litig.*, 627 F.2d 1346, 1350 n.1 (D.C. Cir. 1980) (same). Because the inferior federal courts are "creatures of statute," *Bath County v. Amy*, 80 U.S. (13 Wall.) 244, 247–48 (1871), we must pay careful attention to the legislative texts by which we are given authority. The district court did not address the mistake in the statute, so the task falls to us.

"[C]ourts will not give independent meaning to a word where it is apparent from the context of the act that the word is surplusage," *Am. Radio Relay*

League, Inc. v. FCC, 617 F.2d 875, 879 (D.C. Cir. 1980) (citation and quotation marks omitted), so we will excise the word "Circuit" from the text of § 1276(a)(1). We have no qualms about this erasure, for both Congress's intent and the error impeding it are plain to see. *See* 2A NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47.37 (6th ed. 2002) ("A majority of the cases permit the elimination or disregarding of words in a statute in order to carry out the legislative intent or meaning."); HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1375 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) ("Courts on occasion can correct mistakes . . . when it is completely clear from the context that a mistake has been made."). In § 1276(a), Congress subjected the Secretary's behavior to judicial review in various district courts. It would be absurd to assume that Congress intended to shield the Secretary's national rules against judicial review by granting jurisdiction to a nonexistent court. *Cf. Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D.C. Cir. 1976) (en banc) (Leventhal, J., concurring) ("Congress has been willing to delegate its legislative powers broadly and courts have upheld such delegation because there is court review to assure that the agency exercises the delegated power within statutory limits . . . ."). We read § 1276(a)(1) as granting jurisdiction to the United States District Court for the District of Columbia in the present case, notwithstanding Congress's erroneous inclusion of the word "Circuit." Our jurisdiction to review the final decision of that court comes from 28 U.S.C. § 1291.

III.

We review de novo the district court's grant of summary judgment. *Nat'l Mining Ass'n v. Fowler*, 324 F.3d 752, 756 (D.C. Cir. 2003). Because Congress has charged the Secretary with implementing the

SMCRA, we review the agency's interpretation of the statutory phrase "valid existing rights" under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See Citizens Coal Council v. Norton*, 330 F.3d 478, 481 (D.C. Cir. 2003) (applying *Chevron* to Secretary's interpretation of the SMCRA). Where the statute is ambiguous, we defer to the agency's reasonable interpretation of its meaning. By contrast, a clear expression of congressional intent will bind agency and court alike. *Chevron*, 467 U.S. at 842–43.

The NMA urges that Congress inserted VER in § 522(e) to protect mineral owners' property rights. As the NMA tells it, VER allows surface mining by those with a property right to mine coal. Were this true, the Secretary's restrictive interpretation of VER in the 1999 Rule would violate a congressional directive, and we would be required to set it aside. But we do not read the statute so narrowly. Since 1977, VER has been interpreted by five different Administrations, each of which has found within its borders the room to establish a preferred policy. The NMA takes this history to mean that the agency's current policy is entitled to less deference because it has changed over time, but the opposite is true. That Congress presented so wide a range of plausible interpretations to an agency with rulemaking authority shows a delegation to the executive branch of the power to make reasonable adjustments to the nation's surface mining policy.

A.

Our *Chevron* analysis begins with asking whether Congress has delegated authority to an agency by leaving a statutory gap for the agency to fill. 467 U.S. at 843–44 (citing *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)). Our reading of the SMCRA's language convinces us that VER is an ambiguous

phrase.[2] We have in the past determined that the phrase is subject to multiple and divergent interpretations. *See Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694, 748–51 (D.C. Cir. 1988) (noting the ambiguity inherent in VER and deferring to the Secretary's reasonable interpretation of the phrase as encompassing so-called "continually-created valid existing rights").

The major source of VER's ambiguity is the word "rights." The NMA, reaching for its dictionary, notes that the word "right" could be taken to mean "property right." *See* Appellant's Br. at 34 (interpreting "rights" to mean " 'an interest or title in an object of property' ") (quoting BLACK'S LAW DICTIONARY 1324 (6th ed. 1990)); *see also* BLACK'S LAW DICTIONARY 1347 (8th ed. 2004) (defining "right" as, *inter alia*, an "interest, claim, or ownership that one has in tangible or intangible property"). But according to the same dictionary on which the NMA relies, this is not the only meaning the word will bear. BLACK'S LAW DICTIONARY 1324 (6th ed. 1990) (defining "right" as, *inter alia*, "[a] legally enforceable claim of one person against another, that the other shall do a given act, or shall not do a given act"); *see also* BLACK'S LAW DICTIONARY 1347 (8th ed. 2004) (defining "right" as, *inter alia*, "[a] legally enforceable claim that another will do or will not do a given act"). In fact, this definition cuts against the NMA's proposed interpretation of VER because it is not tied in all circumstances to property.

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[2] We have noted that the legislative history of the SMCRA does not illuminate the meaning of VER. *See Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694, 749 (D.C. Cir. 1988); *cf. Bank One Chi., N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 283 (1996) (Scalia, J., concurring) ("The text's the thing. We should therefore ignore drafting history without discussing it, instead of after discussing it.").

Just as "right" can function as a proxy for property rights, it will also do service more generally. *See, e.g.*, *id.* ("[s]omething that is due to a person by just claim, legal guarantee, or moral principle"); 13 THE OXFORD ENGLISH DICTIONARY 923 (2d ed. 1989) ("[j]ustifiable claim, on moral or legal grounds, to have or obtain something, or to act in a certain way"); WEBSTER'S NEW INTERNATIONAL DICTIONARY 2147 (2d ed. 1952) ("[t]hat to which one has a just claim"). Under *Chevron*, we ask "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. By using a word with multiple and often vague meanings, it is hard for us to conclude that Congress has done that here. The word "right," instead of answering a question, unhelpfully asks another one: To what is a person legally entitled? Similarly, "valid" could mean "[l]egally sufficient," BLACK'S LAW DICTIONARY 1586 (8th ed. 2004), which is equally unhelpful because it requires yet another question: Under law, what makes a miner's rights sufficient? The dictionary counsels in favor of more deference to the agency, not less. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 989 (2005) ("[W]here a statute's plain terms admit of two or more reasonable ordinary usages, the [agency's] choice of one of them is entitled to deference."); *Nat'l R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 418 (1992) ("The existence of alternative dictionary definitions of the word 'required,' each making some sense under the statute, itself indicates that the statute is open to interpretation.") (citation omitted); *AFL-CIO v. FEC*, 333 F.3d 168, 174 (D.C. Cir. 2003) ("[T]he fact that the provision can support two plausible interpretations renders it ambiguous for purposes of *Chevron* analysis.") (citation omitted).

VER could be read, as the NMA suggests, as protecting "valid existing *property* rights." But it could also encompass a narrower protection, as in

the 1999 Rule. Nothing in § 522(e) suggests Congress intended to enact the former understanding over the latter. This case is thus the reverse of *Friends of the Earth, Inc. v. EPA*, 446 F.3d 140 (D.C. Cir. 2006). In *Friends of the Earth*, we found that Congress's use of the word "daily" to modify the phrase "total maximum loads" removed any ambiguity that otherwise existed. *See* 446 F.3d at 144 ("[B]y providing for the establishment of 'total maximum loads,' Congress could have left a gap for EPA to fill. Instead, Congress specified 'total maximum *daily* loads.' "). In § 522(e), by contrast, Congress enacted the ambiguous "valid existing rights" instead of the more precise "valid existing property rights." If VER operates as a "term of art," as the NMA suggests, it is as a tool by which Congress delegates policymaking authority through ambiguity.[3] *See, e.g.*, *Seldovia Native Ass'n v. Lujan*, 904 F.2d 1335, 1345 (9th Cir. 1990) (noting the Secretary's interpretation of VER in 43 U.S.C. §§ 1701–1782); *Alekganik Natives Ltd. v. United States*, 806 F.2d 924, 926 (9th Cir. 1986) (noting the Secretary's interpretation of VER in 43 U.S.C. § 1610(a)(1)); *United States v.*

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[3] Academic commentary supports our reading of VER. We note that the *Journal of Mineral Law & Policy*, a publication of the University of Kentucky College of Law, dedicated an entire issue to analysis of VER as used in the SMCRA. *See generally Valid Existing Rights Symposium*, 5 J. MIN. L. & POL'Y 381 *et seq.* (1990). Despite devoting 375 pages to the topic, the symposium participants reached no consensus on VER's meaning. As stated by Professor Laitos, in whom the NMA's briefing places great faith: "Typically, Congress never lists what interests it means to include within the 'valid existing rights' phrase. The task of interpretation thus falls on the executive branch (*i.e.*, the Department of Interior) or the courts." Jan G. Laitos & Richard A. Westfall, *Government Interference with Private Interests in Public Resources*, 11 HARV. ENVTL. L. REV. 1, 19 (1987). Of course, we cannot outsource the task of statutory interpretation to the professoriate, but we find it illuminating that scholars with expertise in this area have been similarly unable to distill a single, clear meaning from VER.

Garfield County, 122 F. Supp. 2d 1201, 1235–36 (D. Utah 2000) (noting Park Service's interpretation of VER in 16 U.S.C. § 273(a)); *cf.* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 545 (1947) (noting "a recent cartoon in which a senator tells his colleagues 'I admit this new bill is too complicated to understand. We'll just have to pass it to find out what it means.' ").

Of course, not every statutory ambiguity gives rise to agency prerogative. *See Gonzales v. Oregon*, 546 U.S. 243, 258 (2006); *Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 645 (D.C. Cir. 1998). But where Congress has indicated that it "would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law," *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001), its decision to leave "a gap for an agency to fill . . . is a delegation of authority to the agency to give meaning to a specific provision of the statute by regulation," *Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001). So it is in this case. *See* 30 U.S.C. § 1211(c)(2) (empowering the Secretary to "publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of [the SMCRA]"); *Mead*, 533 U.S. at 229 ("We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed."). It remains for us to determine whether the Secretary served as Congress's faithful agent in giving meaning to VER's ambiguities.

B.

Having satisfied ourselves that VER is ambiguous, we defer to the Secretary's interpretation of the phrase if it "is based on a permissible

construction of the statute." *Chevron*, 467 U.S. at 843. All we ask of the agency is a reasonable interpretation. *See Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1240 (D.C. Cir. 2007); *Citizens Coal Council v. Norton*, 330 F.3d 478, 483 (D.C. Cir. 2003). By "consider[ing] the matter in a detailed and reasoned fashion" and demonstrating in its 72-page preamble that "the interpretation is arguably consistent with the underlying statutory scheme in a substantive sense," we conclude that the Secretary has adopted a reasonable interpretation of the statute. *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1206 (D.C. Cir. 1996).[4]

The 1999 Rule remains true to the authority delegated to the Secretary in the SMCRA by protecting against the harmful effects of surface mining that Congress sought to ameliorate. Providing this protection is the primary aim of the statute. *See* 30 U.S.C. § 1201(e) (declaring that regulation of surface coal mining "is an appropriate and necessary means to minimize so far as practicable the adverse social, economic, and environmental effects of such mining operations"); *id.* § 1201(c), (k) (warning of deleterious effects of surface coal mining); *id.* § 1202(a) (stating that a purpose of the SMCRA is to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations"); *id.* § 1202(f) (stating that a purpose of the SMCRA is to "strike a balance between

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[4] Given the overlap between step-two *Chevron* review and the arbitrary-and-capricious review called for by § 1276(a)(1) and the APA, *see Shays v. FEC*, 414 F.3d 76, 96–97 (D.C. Cir. 2005) (collecting cases), the contention that the 1999 Rule violates § 1276(a)(1) fails for similar reasons. In the preamble to the 1999 Rule, the Secretary "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

protection of the environment . . . and the Nation's need for coal as an essential source of energy"). Therefore it is not surprising that the Secretary has promulgated an interpretive rule that cuts against the interests of some miners.

The NMA's suggestion that the SMCRA effected robust protection of miners' property rights is belied by the way Congress used the word "property" in that statute. Of the twenty-nine instances in which "property" appears, only one refers to protecting the property rights of subsurface owners of the mineral estate. *Id.* § 1304(g) (concerning coal owned by the United States). Many uses of "property" concern the protection of surface or adjacent property owners *against* the harmful effects of surface mining, *id.* §§ 1201(c), 1233(a)(1)(A), 1239(a), 1253(a)(15)(C), 1253(a)(17), 1257(f), 1269(a), 1270(f), 1272(a)(3)(D), 1307(b), and several mentions of "property" run counter to miners' property rights, in that they authorize government entry onto mined property to assess and remedy environmental degradation caused by strip mining, *id.* §§ 1237(a), 1237(b), 1240(b).

Save for repeating its argument that VER is unambiguous and accusing the Secretary of "flip-flopping," Appellant's Br. at 53, the NMA provides little resistance on this front.[5] With the exception of the constitutional avoidance argument, discussed next, the NMA offers no basis for finding the Secretary's interpretation unreasonable. If that argument fails, we must accord *Chevron* deference to the 1999 Rule. *See Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 299 (D.C. Cir. 2003) ("Here, however,

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[5] The NMA's "flip-flopping" point ignores the agency's obligation to "consider varying interpretations and the wisdom of its policy on a continuing basis," *Chevron*, 467 U.S. at 863–64.

[petitioner] advances no additional argument beyond those already discussed as part of step one, and so we have no basis for finding the Commission's interpretation unreasonable. In any event, the language of [the statute] plainly admits of the Commission's interpretation, and it therefore is a permissible construction of the statute.").

The NMA asserts that the 1999 Rule runs afoul of both the Due Process and Takings Clauses of the Fifth Amendment, an argument raised to invoke the canon of constitutional avoidance. Because the judiciary must rightly presume that Congress acts consistent with its duty to uphold the Constitution, courts make every effort to construe statutes so as to find their constitutional foundations and thus avoid needless constitutional confrontations. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). This canon of constitutional avoidance trumps *Chevron* deference, *see DeBartolo*, 485 U.S. at 574–77, and we will not submit to an agency's interpretation of a statute if it "presents serious constitutional difficulties," *Chamber of Commerce v. FEC*, 69 F.3d 600, 605 (D.C. Cir. 1995). But we do not abandon *Chevron* deference at the mere mention of a possible constitutional problem; the argument must be serious. *See Republican Nat'l Comm. v. FEC*, 76 F.3d 400, 409 (D.C. Cir. 1996). The NMA's arguments are not.

Though its briefs are unclear, the NMA appears to argue that its procedural due process rights were violated because the 1999 Rule created no mechanism by which miners could comply with the good-faith permitting requirement had they not already done so by August 3, 1977. The NMA argues that *United States v. Locke*, 471 U.S. 84, 108 (1985),

and *Texaco, Inc. v. Short*, 454 U.S. 516, 531–32 (1982), require such a mechanism. But those cases dealt with a different type of legislative determination than we have here. In both *Locke* and *Texaco*, a legislature addressed a dispute over dormant mines by creating a process that would allow miners to protect their claims. The issue in those cases was whether claimants had been improperly denied their rights to make their claims. In § 522(e), Congress chose a different means to address a problem: It prohibited new surface mining in sensitive areas for all but those who could show a valid existing right to mine the land. Congress created no process by which to abide, no regulatory regime with which to comply. It simply declared surface mining off limits for those who had no valid existing rights. Congress created no process that the NMA can successfully argue it was denied.

The NMA also argues that the 1999 Rule precludes *Chevron* deference by working a taking of subsurface coal interests. A taking, however, is only unconstitutional if the government fails to pay just compensation, and the Tucker Act provides for such a remedy. *See* 28 U.S.C. § 1491(a). Miners can pursue their takings claims in the Federal Claims Court. Given this protection, the NMA's takings challenge raises no serious question about the 1999 Rule that would preclude *Chevron* deference. *See United States v. Riverside Bayview Homes*, 474 U.S. 121, 127–28 (1985); *Ry. Labor Executives' Ass'n v. United States*, 987 F.2d 806, 816 (D.C. Cir. 1993) (per curiam).

This is not to say that the canon of constitutional avoidance can be ignored with respect to every argument sounding in the Takings Clause. The Supreme Court has recognized that the Claims Court is not a proper venue if a statute creates "an identifiable class of cases in which application of

[the] statute will necessarily constitute a taking." *Riverside Bayview*, 474 U.S. at 128 n.5 (construing *United States v. Sec. Indus. Bank*, 459 U.S. 70, 78 (1982)). Likewise, we have refused *Chevron* deference to an agency interpretation that created an "identifiable class" of takings victims. *See Bell Atl. Tel. Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994) (noting that "*Chevron* deference to agency action that creates a broad class of takings claims, compensable in the Court of Claims, would allow agencies to use statutory silence or ambiguity to expose the Treasury to liability both massive and unforeseen," which would impinge Article I authority). But the NMA has shown no "identifiable class" of miners whose takings claims would expose the Treasury to such liability. At oral argument, the NMA did not claim that the government would be on the hook for a "massive and unforeseen" sum, paid out to frustrated miners as just compensation. *See* Oral Arg. Recording at 14:45–17:52. The record is devoid of evidence suggesting it is so. Given this implicit concession that the 1999 Rule will have relatively insignificant takings implications that can be readily addressed in the Court of Claims, there is no serious constitutional problem to be avoided. "[T]he avoidance canon is not applicable when the statute or regulation would effect a taking, if at all, only in certain situations." *Nat'l Mining Ass'n v. Babbitt*, 172 F.3d 906, 917 (D.C. Cir. 1999). The usual *Chevron* analysis is therefore applied to the 1999 Rule, which results in our deferring to the Secretary's reasonable interpretation of an ambiguous statutory term.

IV.

The district court properly accorded *Chevron* deference to the Secretary's interpretative rule. The judgment is

Affirmed.

APPENDIX B
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 00-283 (RWR)

NATIONAL MINING ASSOCIATION,
Plaintiff,

v.

LYNN SCARLETT, *et al.*,

Defendants.

MEMORANDUM OPINION

Plaintiff National Mining Association ("NMA") challenges as arbitrary, capricious, or otherwise inconsistent with the law the 1999 final rule of the Office of Surface Mining Reclamation and Enforcement ("OSM") and the Secretary of the Interior ("Secretary")[1] interpreting "valid existing rights" under the Surface Mining Control and Reclamation Act of 1977 ("SMCRA" or "the Act"), 30 U.S.C. §§ 1201 et seq., which prohibits new surface coal mining operations on specified lands subject to

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[1] Lynn Scarlett, the current Acting Secretary of the Interior and Jeffrey Jarrett, the current Director of the Office of Surface Coal Mining and Reclamation, are substituted as defendants in lieu of former Secretary Bruce Babbit and former Director Kathleen Karpan. See Fed. R. Civ. P. 25(d)(1).

valid existing rights. NMA alleges that the final rule improperly limits the circumstances under which valid existing rights will be recognized, contrary to clear Congressional intent. NMA has moved for summary judgment, and the Secretary and OSM, and intervenor-defendants, have cross-moved for summary judgment. Because NMA has failed to show that the 1999 final rule is contrary to the clear intent of Congress, arbitrary, capricious, or otherwise inconsistent with the law, NMA's motion for summary judgment will be denied. Moreover, because the Secretary's interpretation of valid existing rights is a permissible construction of the statute and the agency reviewed all the relevant data in reaching its conclusion, defendants' and intervenor-defendants' motion for summary judgment will be granted.

BACKGROUND

The SMCRA was passed in 1977 as "a comprehensive statute designed to 'establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'" Hodel v. Virginia Surface Mining and Reclamation Assoc., 452 U.S. 264, 268 (1981) ("VSMRA") (quoting 30 U.S.C. § 1202(a)). Congress sought to "strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy." 30 U.S.C. § 1202(f). Section 522(e) of the Act prohibits new surface coal mining operations on certain lands directly declared by Congress to be unsuitable for mining.[2] 30 U.S.C.

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[2] These lands include the National Park System, the National Wildlife Refuge Systems, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, federal lands within any national forest, publicly owned parks or historic sites that will be adversely affected by mining, areas within one hundred feet of public roads, areas within three hundred feet of occupied dwellings or

§ 1272(e)(1)-(5); see also Nat'l Wildlife Fed. v. Hodel, 839 F.2d 694, 749 (D.C. Cir. 1988). However, the prohibition of new mining operations on these lands is "subject to valid existing rights." Id. Congress failed to define or elaborate on the meaning of "valid existing rights" in the statutory language of the SMCRA or in its legislative history. See Nat'l Wildlife Fed. v. Hodel, 839 F.2d at 749. The meaning of valid existing rights in the SMCRA has been the subject of extensive litigation since the passage of the Act, and in 1999, OSM promulgated the latest iteration of regulations defining the phrase. See Valid Existing Rights, 64 Fed. Reg. 70766, 70766-838 (Dec. 17, 1999).

I. REGULATORY HISTORY

A. 1979 regulation

OSM first promulgated a final rule defining valid existing rights for SMCRA § 522(e) in 1979. This first final rule

> provided that, except for haul roads, [valid existing rights] included only those property rights in existence on August 3, 1977, the owners of which either had obtained all necessary permits for the proposed surface coal mining operation on or before August 3, 1977 (the 'all permits' standard), or could demonstrate that the coal for which the exception was sought was both needed for and immediately adjacent to a surface coal mining operation in existence on August 3, 1977 (the 'needed for and adjacent to' standard).

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public and community buildings, and areas within one hundred feet of a cemetery. See 30 U.S.C. § 1272(e)(1)-(5).

64 Fed. Reg. at 70769-70 (citing 44 Fed. Reg. 14902, 15342 (Mar. 13, 1979)). Several plaintiffs challenged the adoption of the "all permits" standard defining valid existing rights, arguing, among other things, that the standard was contrary to Congressional intent to preserve state law property rights, that it constituted an unconstitutional taking, and that it was arbitrary and capricious. See In re Permanent Surface Mining Regulation Litigation, 14 Env't Rep. Cas. (BNA) 1083, 1090-91 (D.D.C. Feb. 26, 1980) ("PSMRL I"). The district court remanded the regulation back to OSM explaining that the "all permits" standard must also include individuals who had not yet obtained all permits but had made a good-faith attempt to do so. Id. at 1091. The PSMRL I court did not reach the question of Congressional intent explaining that the Secretary had conceded that Congress intended valid existing rights "to encompass property rights recognized as valid under state case law." Id. at 1090. The court also declined to reach the takings challenge to the "all permits" standard because the plaintiffs' claim was "hypothetical" and did not present the court with sufficient facts to decide the issue. Id. at 1091. On appeal, because the government informed the court it was reconsidering the 1979 rule, the D.C. Circuit remanded the case to the district court. In so doing, the D.C. Circuit explained that the district court judgment should not be considered final and that the issues and arguments raised should be considered during the planned regulatory revision process. 64 Fed. Reg. at 70770 (citing In re Permanent Surface Mining Regulation Litigation, No. 80-1810, Order of Remand (D.C. Cir. Feb. 1, 1983). (See Pl.'s Stmt. of Material Facts ¶ 16.) In 1980, OSM suspended the 1979 final rule and announced that in the interim period the agency would interpret valid existing rights to include a property rights holder who had obtained all permits or had made a good faith effort

to obtain all permits. 64 Fed. Reg. at 70770. (See Pl.'s Stmt. of Material Facts ¶ 17.) This standard has come to be known as the "good faith/all permits" standard. Id.

B. 1983 Regulation And 1986 Suspension Notice

In 1983, OSM issued a final rule adopting a "takings" standard for valid existing rights. The rule provided that a valid existing right would exist

> for an area protected under section 522(e) of the Act on August 3, 1977, if the application of any of the prohibitions contained in that section to the property interest that existed on that date would effect a taking of the person's property which would entitle the person to just compensation under the Fifth and Fourteenth Amendments to the United States Constitution.

(Pl.'s Stmt. of Material Facts ¶ 22) (quoting 30 C.F.R. § 761.5 (1983).) See 64 Fed. Reg. at 70770. In settling on this rule, OSM rejected all six rules, including a "good faith/all permits" standard, that it had proposed in 1982. 64 Fed. Reg. at 70770. (See Pl.'s Stmt. of Material Facts ¶ 20.) Several plaintiffs challenged the final rule arguing that the rule was so different from the various proposed rules that the agency was required to have an additional period for notice and comment. In re: Permanent Surface Mining Litigation, 22 Env't Rep. Cas. (BNA) 1557, 1558-59 (D.D.C. Mar. 1, 1985) ("PSMRL II"). The PSMRL II court agreed and remanded the rule to the agency. Id. at 1559, 1567. In a 1986 suspension notice, OSM rescinded the rule in order to comply with the court's order and reinstated the "good faith/all permits" standard. 64 Fed. Reg. at 70770. (See Pl.'s Stmt. of Material Facts ¶ 26.)

C. 1988 and 1991 Rulemaking and the Energy Policy Act of 1992

In 1988, OSM proposed, but later withdrew to allow further study, a rule defining valid existing rights as including the "good faith/all permits" standard and an "ownership and authority" standard under which valid existing rights could be established by demonstrating ownership of the coal and authority to mine it according to applicable state law. 64 Fed. Reg. 70770-71. (See Pl.'s Stmt. of Material Facts ¶ 27-34.) In 1990, OSM and the University of Kentucky College of Law cosponsored a symposium on the meaning of valid existing rights in § 522(e) of the SMCRA. 64 Fed. Reg. at 70771. See generally Symposium on Valid Existing Rights, 5 J. of Min. L. & Pol'y 381 (1990). "The participants [of the symposium] provided extensive analyses of takings jurisprudence and case law related to [valid existing rights], but they did not reach a consensus on how to determine [those rights]." 64 Fed. Reg. at 70771. Still seeking to comply with the court's order in PSMRL II, in 1991, OSM proposed to define valid existing rights as including the "takings" standard, the "good faith/all permits" standard, and the "needed for and adjacent to" standard. 64 Fed. Reg. at 70771. (See Pl.'s Stmt. of Material Facts ¶ 40.)

Before OSM promulgated a final rule, Congress enacted and the President signed the Energy Policy Act of 1992, directing the Secretary to interpret valid existing rights as set forth in the 1986 suspension notice that had adopted the "good faith/all permits" standard. See Pub. L. No. 102-486, 206 Stat. 2776 (1992). The Energy Policy Act of 1992 expired on October 23, 1993. However, the "good faith/all permits" standard continued as the regulatory standard for valid existing rights through October 1, 1995 because Congress placed moratoriums on publication of a new final rule on the

definition of valid existing rights. See, e.g., Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 103-332, 108 Stat. 2499 (1995); see also 64 Fed. Reg. at 70771.

D. 1999 regulation

In 1997, after evaluating the comments received on the 1991 proposed rule, OSM withdrew the rule and proposed a rule defining valid existing rights with the "good faith/all permits" standard. See Valid Existing Rights, 42 Fed. Reg. 4836 (Jan. 31, 1997). In December 1999, the agency promulgated a final rule by largely adopting its proposed rule. Under the rule, a person can establish valid existing rights by demonstrating a property right under applicable state law existing at the time the land came under protection of the SMCRA that vests the person with the right to conduct the intended type of surface coal mining intended, and (1) by having acquired or made a good-faith effort to acquire all necessary permits to conduct mining before the land came under protection of the act, or (2) demonstrating that the land is needed for and immediately adjacent to a surface coal mining operation. See 30 C.F.R. 761.5. The rule also recognizes valid existing rights for use or construction of roads on protected land under certain circumstances. Id.

II. THE RULEMAKING PROCESS FOR THE 1999 FINAL RULE

During the rulemaking process for the 1999 final rule, OSM considered several alternative definitions of valid existing rights, weighed the environmental impact of each alternative and considered the legislative history of SMCRA § 522(e), relevant litigation and case law, and comment letters before selecting the "good faith/all permits" and "needed for and adjacent to" standards.

A. Alternative regulatory standards

The alternative regulatory standards OSM considered included the "needed for and adjacent to" standard in combination with each of the following standards: (1) a "good faith/all permits" standard, (2) a "good faith/all permits or takings" standard under which valid existing rights could be established by a good faith effort to obtain all necessary permits or if applying the prohibitions of § 522(e) would result in an unconstitutional taking, (3) an "ownership and authority standard" under which a person claiming a valid existing rights exception would be required to demonstrate both a property right to the coal and the right to mine by the method intended, and (4) a "bifurcated" standard, under which either the "ownership and authority" standard or the "good faith/all permits" standard would apply depending on whether and when the mineral rights were severed from the estate. 64 Fed. Reg. at 70775. OSM concluded that the good faith/all permits and needed for and adjacent to standard[3] "best achieves protection of the lands listed in section 522(e) in a manner consistent with congressional intent at the time of SMCRA's enactment[,]" while simultaneously protecting "the interests of those persons who had taken concrete steps to obtain regulatory approval for surface coal mining operations on lands listed in section 522(e) before those lands came under the protection" of the SMCRA. Id. at 70776. OSM also determined that adoption of the "good faith/all permits" standard would cause the least disruption to the current State regulatory programs because "20 of the 24 approved State regulatory programs under

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[3] For brevity, this standard will be referred to as the "good faith/all permits" standard, but encompasses the recognition of valid existing rights in certain circumstances for use or construction of roads.

SMCRA already rely upon either the good faith/all permits standard or the all permits standard." Id.

B. Environmental and economic impact

OSM analyzed the environmental and economic impacts of each of these alternative regulatory standards and found that "compared with the other alternatives considered, the good faith/all permits standard is the most protective of the lands listed in section 522(e)." Id. In support of its finding, OSM cites an environmental impact statement that predicts that the adoption of the "takings" standard would result in the mining of 2,855 more acres of protected lands between 1995 and 2015 than if the "good faith/all permits" standard were adopted. Id. The impact statement predicted that the adoption of either the bifurcated standard or the "ownership and authority" standard would result in the mining of over 3,000 additional acres comparatively during the same time period. Id. OSM emphasized that the "additional disturbance would occur entirely on some of the lands for which the Senate Committee expressed the most concern." Id. In analyzing the economic impact of each proposed rule, OSM found only "negligible differences among the alternatives in terms of their economic impact." Id.

C. Consideration of legislative history

OSM also considered the legislative history of SMCRA § 522(e), but was unable to discern from Congress "clear or dispositive direction on the meaning or purpose of [valid existing rights.]" Id. OSM grants that "[t]here are credible supporting and opposing arguments for each alternative," but ultimately credits the Senate and House committee reports on the bills that eventually became the SMCRA to conclude that "Congress' purpose in enacting section 522(e) was to prevent new surface coal mining on the lands listed in that section." Id.

OSM specifically cites the following language from the Senate Committee on Energy and Natural Resources:

> [T]he Committee has made a judgment that certain lands simply should not be subject to new surface coal mining operations. These include primarily and most emphatically those lands which cannot be reclaimed under the standards of this Act and the following areas dedicated by the Congress in trust for the recreation and enjoyment of the American people: lands within the National Park System, the National Wildlife Refuge System, the National Wilderness Preservation System, the Wild and Scenic Rivers System, National Recreation Areas, National Forests with certain exceptions, and areas which would adversely affect parks or National Register of Historic [Places].
>
> In addition, for reasons of public health and safety, surface coal mining will not be allowed within one hundred feet of a public road (except to provide access for a haul road), within 300 feet of an occupied building or within 500 feet of an active underground mine.
>
> Since mining has traditionally been accorded primary consideration as a land use there have been instances in which the potential for other equally or more desirable land uses has been destroyed. The provisions discussed in this section were specifically designed and incorporated in the bill in order to

> restore more balance to Federal land use decisions regarding mining.

S. Rep. No. 95-128, at 55 (1977). OSM also cites the House Committee on Interior and Insular Affairs report, which reads in part:

> [T]he decision to bar surface mining in certain circumstances is better made by Congress itself. Thus section 522(e) provides that, subject to valid existing rights, no surface coal mining operation except those in existence on the date of enactment, shall be permitted on lands within the boundaries of units of certain Federal systems such as the national park system and national wildlife refuge system[ ], on Federal lands within the boundaries of any national forest (except in those circumstances set forth in Sec. 522(c) of the committee amendment) or in other special circumstances, that is within 100 feet of public roads, 300 feet of public buildings or churches, or 100 feet of a cemetery.

H.R. Rep. No. 95-218, at 95 (1977). OSM also explained that its definition for valid existing rights differs from the definition of the phrase in other federal statutes because unlike other statutes, the SMCRA applied to both Federal and non-Federal lands, concerns only a person's right to use land for a particular purpose and does not involve a transfer of property rights or interests from the Federal government to another party. 64 Fed. Reg. at 70793.

D. Review of relevant litigation

OSM also reviewed relevant litigation concerning valid existing rights and potential takings under the SMCRA. OSM addressed the

statement by the Supreme Court in VSMRA, 452 U.S. at 296 n.37, that an "all permits" standard for the valid existing rights exception "is not compelled by either the statutory language [of the SMCRA] or its legislative history." OSM reasoned that VSMRA did not reject the possibility of a "good faith/all permits" standard because the Court chose "decidedly neutral" language in stating simply that an "all permits" rule with no good-faith exception was not compelled by SMCRA and because "the definition of [valid existing rights] was not before the court" in that case. 64 Fed. Reg. at 70779. In addition, OSM explained its reliance on PSMRL I where the court held that "a good faith attempt to obtain all permits before the August 3, 1977 cut-off date should suffice for meeting the all permits test" that was promulgated in 1979. PSMRL I, 14 Env't Rep. Cas. (BNA) at 1091; see 64 Fed. Reg. at 70779. OSM also explained that PSMRL I held only that state law must be taken into account during the property rights demonstration prong of a permit-based standard requiring valid conveyance of a property right and receipt of all permits by the property right owner. See 64 Fed. Reg. at 70779. Further, OSM reviewed the Supreme Court's takings jurisprudence, and cases that have challenged the constitutionality of § 522(e) specifically. Id. at 70780-81. Based on that review, the agency concluded that "there is nothing in these court decisions, SMCRA, or its legislative history that precludes adoption of a good faith/all permits standard for [valid existing rights] under section 522(e) or suggests that adoption of this standard would be a facial regulatory taking." Id. at 70781.

E. Consideration of public comments

Finally, OSM heard testimony in the four public hearings it held on the proposed rule and considered approximately 75 comment letters

submitted by interested parties during the notice and comment period. Id. at 70767. The comments OSM considered expressed a wide range of concerns about the "good faith/all permits" definition of valid existing rights and were submitted by private citizens, companies and associations affiliated with mining, environmental groups, and federal, state, and local governmental entities. Id. at 70767.

NMA challenges the 1999 final rule adopting the "good faith/all permits" standard arguing that the rule is contrary to clear Congressional intent, arbitrary and capricious, and an unconstitutional infringement on property rights. Defendants counter that Congress did not express a clear intent regarding how valid existing rights should be defined, and that the 1999 final rule is permissible and reasonable in light of the record, legislative history and language of the SMCRA.

DISCUSSION

Summary judgment is appropriate where the record shows that "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A party seeking summary judgment must provide the district court with a factual record sufficient to demonstrate the absence of a genuine issue of material fact. See Burke v. Gould, 286 F.3d 513, 517 (D.C. Cir. 2002). This action arises out of a disagreement over the validity of the regulations that OSM promulgated in 1999, and no genuine issue over material facts exists.

I. STANDARD OF REVIEW

Under the SMCRA, a court must invalidate regulations that are "arbitrary, capricious, or otherwise inconsistent with the law." 30 U.S.C. § 1276(a)(1). To determine if agency action is arbitrary and capricious, district courts employ the

two-part test of Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). A court must first determine "[i]f 'Congress has directly spoken to the precise question at issue[.]'" New York v. EPA, No. 03-1380, 2006 WL 662746, at *2 (D.C. Cir. Mar. 17, 2006) (quoting Chevron, 467 U.S. at 842). If Congress clearly expressed its intent, then "'that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" Id. (quoting Chevron, 467 U.S. at 842-43). However, "if the statute is silent or ambiguous . . . [courts] defer to the agency's interpretation, asking 'whether [it] is based on a permissible construction of the statute.'" Id. (quoting Chevron, 467 U.S. at 843).

To determine Congressional intent and the meaning of the statute under the first prong of Chevron, courts employ "traditional tools of statutory construction[.]" See id.; Automated Power Exch., Inc. v. FERC, 204 F.3d 1144, 1151 (D.C. Cir. 2000). Chevron analysis often begins and ends with the statutory text because "the language of the statute itself is always the best indication of congressional intent." Abbott Labs. v. Young, 920 F.2d 984, 987 (D.C. Cir. 1990). In order to determine whether the plain language of the statute is dispositive, the court must consider not only the particular statutory language at issue, but "'the language and design of the statute as a whole'" as well. Coal Employment Project v. Dole, 889 F.2d 1127, 1131 (D.C. Cir. 1989) (quoting K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988)). However the court is not confined to the four corners of the statute and may also consider the statute's legislative history when determining whether Congress clearly expressed its intent. Id.

If Congress has not clearly expressed its intent on the precise issue, considerable weight is due an agency's reasonable construction of a statutory

scheme it is entrusted to administer. Chevron, 467 U.S. at 843-44. "[J]udicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well-settled principle of federal law." U.S. Postal Serv. v. NLRB, 969 F.2d 1064, 1069 (D.C. Cir. 1992) (quoting Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 417 (1992)). "Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Southern Co. Services, Inc. v. FCC, 313 F.3d 574, 579-80 (D.C. Cir. 2002) (internal quotation marks omitted). A reviewing court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Id. at 580 (internal quotations marks omitted).

II. CONGRESSIONAL INTENT

NMA argues that Congress clearly announced its intent for the definition of valid existing rights and that OSM's 1999 final rule adopting a "good faith/all permits" standard is contrary to that intent. (See Pl.'s Mem. of Points and Auths. in Supp. of Mot. for Summ. J. ("Pl.'s Mem. Summ. J.") at 7-27.) However, the D.C. Circuit already has explained that "[n]either the statutory language nor the legislative history [of the SMCRA] elaborate on the meaning of the phrase 'valid existing rights.'" Nat'l Wildlife Fed. v. Hodel, 839 F.2d at 749. After more than twenty years of litigation, the only guideposts evident for permissible regulations defining valid existing rights are that an all- permits rule with no good-faith exception is arbitrary and capricious, see PSMRL I, 14 Env't Rep. Cas. at 1091, and that Congress intended some recognition of applicable state law

property rights and an avoidance of takings.[4] See Nat'l Wildlife Fed. v. Hodel, 839 F.2d at 750. OSM has not strayed outside the boundaries of these guideposts because OSM's 1999 final rule includes a good-faith exception, encompasses recognition for state law property rights at the property right demonstration prong of the rule, and reveals concern over minimizing takings. The 1999 final rule is not contrary to Congressional intent.

III. PERMISSIBLE CONSTRUCTION

OSM also considered the relevant factors and articulated a satisfactory explanation for its decision, and so the agency's decision is due Chevron deference. OSM considered four definitions of valid existing rights and analyzed the economic and environmental impact of each alternative. 64 Fed. Reg. at 70775-76. In addition, OSM examined the legislative history of section 522(e), reviewed the extensive relevant litigation and considered the potential takings implications. Id. at 70768-69, 70778-81. OSM also conducted four public hearings, and reviewed approximately seventy-five written comments. Id. at 70767.

In justifying its decision, OSM primarily explained that the "good faith/all permits" rule is consistent with the underlying purposes of SMCRA

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[4] NMA believes the D.C. Circuit's reference in National Wildlife Federation v. Hodel to the legislative history of the SMCRA as providing "some help" in "suggest[ing] that Congress did not intend to infringe on valid property rights or effect takings through § 522(e)" was a declaration from the court that Congress clearly intended to preclude any permits-based standard for defining valid existing rights. (*See* Pl.'s Mem. Summ. J. at 33- 34 (discussing Nat'l Wildlife Fed. v. Hodel, 839 F.2d at 750).) However, the court's cautious language counsels against such a broad reading. Moreover, in that case the D.C. Circuit affirmed a ruling of the district court that a permits-based standard was consistent with the SMCRA. Nat'l Wildlife Fed. v. Hodel, 839 F.2d at 750-51.

and with current state regulatory regimes. When the SMCRA was enacted in 1977, it was designed as a compromise "both to protect the environment and to ensure an adequate supply of coal to meet the nation's energy requirements." Nat'l Wildlife Fed'n v. Lujan, 950 F.2d 765, 770 (D.C. Cir. 1991) (citing 30 U.S.C. § 1202(f)). The Senate Committee on Energy and Natural Resources concluded that § 522(e) was specifically designed to "restore more balance to Federal land use decisions regarding mining." S. Rep. No. 95-128, at 55 (1977). The "good faith/all permits" standard adopted by OSM reasonably strikes a balance between protecting the environment and ensuring an adequate supply of coal. Of the definitions of valid existing rights OSM considered, the "good faith/all permits" definition is "the most protective of the lands listed in section 522(e)." 64 Fed. Reg. at 70776. An environmental impact study cited by OSM predicted that implementing the "ownership and authority" standard, as opposed to the "good faith/all permits" standard, would open up 3,062 more acres of land to surface coal mining. Id. The "good faith/all permits" standard also "protects the interests of those persons who had taken concrete steps to obtain regulatory approval for surface coal mining operations on lands listed in section 522(e) before those lands came under the protection of . . . section 522(e)." Id. Additionally, OSM reports that its final rule would have no "significant economic impact on the mining industry or the cost of producing and delivering coal." Id.

OSM reports, and NMA does not dispute, that the "good faith/all permits" standard is also consistent with current state regulatory standards. In fact, many state regulatory programs have relied on the "good faith/all permits" standard for approximately twenty years. (See Federal Defendants' Reply Mem. at 10.) Prior to the issuance of the 1999 final regulation, twenty state regulatory

programs had incorporated some version of the "good faith/all permits" standard or the "all permits" standard into their own regulatory frameworks. 64 Fed. Reg. at 70776. Further, the "good faith/all permits" rule previously has been applied as the federal standard, having been implemented in 1980 and 1986 at the direction of OSM and in the early 1990s at the direction of Congress. OSM's belief that the adoption of a "good faith/all permits" standard would cause the least disruption to existing regulatory programs was reasonable. Id.

Because OSM met its obligations to review the relevant information and articulate a rational explanation for its actions, its decision to adopt the "good faith/all permits" definition of valid existing rights will be accorded deference.

IV. CONSTITUTIONAL CLAIMS

A. Takings

NMA argues that the "good faith/all permits" test constitutes a Fifth Amendment taking because it eliminates the right to mine in categories of land covered by § 522(e). (Pl.'s Mem. Summ. J. at 39-40.) The Fifth Amendment provides that "[no] private property [shall] be taken for public use, without just compensation." In VSMRA, the Supreme Court held that the "mere enactment" of SMCRA does not constitute a taking, nor does it, "on its face, deprive owners of land within its reach of economically viable use of their land since it does not proscribe nonmining uses of such land." 452 U.S. at 296 n.37.

NMA has not demonstrated that the new regulation results in an unconstitutional taking. In addition to those reasons set forth by the Supreme Court, it is clear that if valid existing rights are denied, compensation is available under the Tucker Act. See 28 U.S.C. § 1491; see also United States v. Riverside Byview Homes, Inc. 474 U.S. 121, 127-28

(1985) (holding that requiring a person to obtain a permit before engaging in a certain use of his property does not "take" the property, but even if it did, "so long as compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional.") Because compensation would be available if property is taken, no unconstitutional taking results from the 1999 final rule.

B. Due Process

NMA also contends that OSM has not provided property rights holders "'a reasonable opportunity both to familiarize themselves with the general requirements imposed and to comply with those requirements'" in violation of the Due Process Clause. (*See* Pl.'s Mem. Summ. J. at 44 (quoting United States v. Locke, 471 U.S. 84, 108 (1985).)

In a pre-SMCRA opinion, the Supreme Court held that "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations[,] . . . even [if] the effect of the legislation is to impose a new duty or liability based on past acts." Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16 (1976). In fact, the SMCRA grew out of decades of discussions about banning surface coal mining, including various Congressional bills that were vetoed by President Ford. (See Intervenor Defs.' Mot. for Summ. J. at 24-25.) In any event, as is noted above, all affected parties had numerous opportunities to comment on the appropriate standard during the multiple rulemaking processes. As such, plaintiff received all the process it was due. The promulgation of the 1999 final rule did not violate the Due Process Clause of the Fifth Amendment to the Constitution.

CONCLUSION

OSM's "good faith/all permits" standard is not inconsistent with the discernable Congressional intent related to § 522(e) of the SMCRA. Moreover, OSM considered the relevant factors and supplied a rational explanation for its conclusion. Therefore, the 1999 final rule is not arbitrary, capricious, inconsistent with the law or otherwise unreasonable, and is entitled to deference. In addition, the 1999 final rule does not constitute a takings violation, nor does it deprive property rights holders of due process. Accordingly, NMA's motion for summary judgment will be denied and federal defendants' and intervenor defendants' motion for summary judgment will be granted. A final Order accompanies this Memorandum Opinion.

SIGNED this fourth day of May, 2006.

/s/
RICHARD W. ROBERTS
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5199 **September Term, 2007**

00cv00283

Filed On: March 14, 2008 [1105748]

National Mining Association,

Appellant,

v.

Dirk Kempthorne, Secretary of the Interior, et al.,

Appellee.

BEFORE: Garland and Griffith, Circuit Judges, and Edwards, Senior Circuit Judge.

ORDER

Upon consideration of appellant's petition for rehearing filed February 29, 2008, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer

BY:

Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5199 **September Term, 2007**

00cv00283

Filed On: March 14, 2008 [1105748]

National Mining Association,
Appellant,

v.

Dirk Kempthorne, Secretary of the Interior, et al.,
Appellee.

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson,* Randolph, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges, and Edwards, Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer

BY:

Michael C. McGrail
Deputy Clerk

* Circuit Judge Henderson did not participate in this matter.

APPENDIX D

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

June 4, 2008

Ms. Catherine E. Stetson
Hogan & Hartson L.L.P.
555 Thirteenth Street, N.W.
Washington, DC 20004

Re: National Mining Association
v. Dirk Kempthorne, Secretary of the Interior, et al.
Application No. 07A945

Dear Ms. Stetson:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to The Chief Justice, who on June 4, 2008 extended the time to and including July 12, 2008.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter,
Clerk

by /s/_____

Gail Johnson
Case Analyst

APPENDIX E
LIST OF OVER 100 FEDERAL STATUTES PROTECTING VALID EXISTING RIGHTS

1. 10 U.S.C. § 7439(b)
2. 16 U.S.C. § 47e
3. 16 U.S.C. § 80a
4. 16 U.S.C. § 90
5. 16 U.S.C. § 90a
6. 16 U.S.C. § 90a-1
7. 16 U.S.C. § 90c-1(b)
8. 16 U.S.C. § 90e(a)
9. 16 U.S.C § 90e-1
10. 16 U.S.C. § 110c(c)(1), (d)(1)
11. 16 U.S.C. § 111c
12. 16 U.S.C. § 228b(a)
13. 16 U.S.C. § 271

14. 16 U.S.C. § 272(a)(1)

15. 16 U.S.C. § 272d(b)(1)

16. 16 U.S.C. § 272g(a)(3)

17. 16 U.S.C. § 273(a)

18. 16 U.S.C. § 398c

19. 16 U.S.C. § 403-3

20. 16 U.S.C. § 403k-1

21. 16 U.S.C. § 405

22. 16 U.S.C. § 406d-1

23. 16 U.S.C. § 408e

24. 16 U.S.C. § 410bb(c)

25. 16 U.S.C. § 410hh-2

26. 16 U.S.C. § 410hh-5

27. 16 U.S.C. § 410ii(a)(3)

28. 16 U.S.C. § 410mm-1(d)

29. 16 U.S.C. § 410zz-2(c)

30. 16 U.S.C. § 410aaa-4

31. 16 U.S.C. § 410aaa-25

32. 16 U.S.C. § 410aaa-47

33. 16 U.S.C. § 410aaa-48

34. 16 U.S.C. § 410aaa-49(b)(3)

35. 16 U.S.C. § 410fff-2(d)

36. 16 U.S.C. § 410fff-5(c)

37. 16 U.S.C. § 410fff-7

38. 16 U.S.C. § 410hhh-5(e)(1)

39. 16 U.S.C. § 450y

40. 16 U.S.C. § 450oo

41. 16 U.S.C. § 460q

42. 16 U.S.C. § 460q-5

43. 16 U.S.C. § 460v

44. 16 U.S.C. § 460v-4

45. 16 U.S.C. § 460y-5(a)

46. 16 U.S.C. § 460z

47. 16 U.S.C. § 460z-8

48. 16 U.S.C. § 460aa-9

49. 16 U.S.C. § 460dd-2(a)

50. 16 U.S.C. § 460gg-8

51. 16 U.S.C. § 460*ll*-1(b)

52. 16 U.S.C. § 460mm-1(a)-(c)

53. 16 U.S.C. § 460mm-2

54. 16 U.S.C. § 460mm-4(b)

55. 16 U.S.C. § 460nn-3(a)

56. 16 U.S.C. § 460oo(d)(1)-(2)

57. 16 U.S.C. § 460qq(c), (f)

58. 16 U.S.C. § 460rr-2(a), (d)

59. 16 U.S.C. § 460uu-32(a)

60. 16 U.S.C. § 460uu-46(d)(2)

61. 16 U.S.C. § 460vv-3

62. 16 U.S.C. § 460xx-1(c)

63. 16 U.S.C. § 460yy-1(g)

64. 16 U.S.C. § 460aaa-2(a)

65. 16 U.S.C. § 460aaa-5

66. 16 U.S.C. § 460bbb-4(d)

67. 16 U.S.C. § 460bbb-6(a), (c)

68. 16 U.S.C. § 460ccc-2(a)

69. 16 U.S.C. § 460ccc-5(a)

70. 16 U.S.C. § 460ddd(e)

71. 16 U.S.C. § 460ggg(b)

72. 16 U.S.C. § 460ggg-1(b)(1)

73. 16 U.S.C. § 460ggg-2(b)(1)

74. 16 U.S.C. § 460hhh-2(a)

75. 16 U.S.C. § 460hhh-6(a)

76. 16 U.S.C. § 460iii-2(d)

77. 16 U.S.C. § 460jjj-2(b)

78. 16 U.S.C. § 460mmm-4(c), (e), (*l*)(5)(C)

79. 16 U.S.C. § 460nnn-2

80. 16 U.S.C. § 460nnn-23(g)

81. 16 U.S.C. § 460nnn-81(a)

82. 16 U.S.C. § 460nnn-105(c)

83. 16 U.S.C. § 460ooo-2(b)

84. 16 U.S.C. § 460ooo-4(f), (j)

85. 16 U.S.C. § 460ppp-4

86. 16 U.S.C. § 460ppp-6(b)

87. 16 U.S.C. § 460qqq-3(e)(1)

88. 16 U.S.C. § 460qqq-4(a)

89. 16 U.S.C. § 460rrr-5(d)

90. 16 U.S.C. § 460sss(c)(2)

91. 16 U.S.C. § 497c(j)

92. 16 U.S.C. § 539(b)

93. 16 U.S.C. § 539a

94. 16 U.S.C. § 539g(d)

95. 16 U.S.C. § 539h(e)

96. 16 U.S.C. § 539i(c)

97. 16 U.S.C. § 539j(c)

98. 16 U.S.C. § 539k(b)(4)

99. 16 U.S.C. § 539*l*(d)(1)(B)

100. 16 U.S.C. § 541

101. 16 U.S.C. § 541f

102. 16 U.S.C. § 543c(g)(1)-(2)

103. 16 U.S.C. § 544e(c)(2)

104. 16 U.S.C. § 544f(b), (m)

105. 16 U.S.C. § 544g(d)(5)

106. 16 U.S.C. § 544*l*(f)

107. 16 U.S.C. § 545a(i)

108. 16 U.S.C. § 545b(d)(7)(A)

109. 16 U.S.C. § 546a-1(a)

110. 16 U.S.C. § 546a-3

111. 16 U.S.C. § 695p

112. 16 U.S.C. § 698v-3(e)(1)

113. 16 U.S.C. § 1133(d)(3)

114. 16 U.S.C. § 1274(a)(62)(C)

115. 16 U.S.C. § 1279(b)

116. 16 U.S.C. § 1280(a)(ii)-(iii), (b)

117. 16 U.S.C. § 1604(h)(3)(i)

118. 16 U.S.C. § 3144(c)

119. 16 U.S.C. § 3200(a)

120. 16 U.S.C. § 3215(a)(1)

121. 16 U.S.C. § 4308(d)

122. 25 U.S.C. § 293b

123. 25 U.S.C. § 566d

124. 25 U.S.C. § 575

125. 25 U.S.C. § 621

126. 25 U.S.C. § 766(a)

127. 25 U.S.C. § 903d(b)-(c)

128. 25 U.S.C. § 1300i-1(c)(2)

129. 25 U.S.C. § 1777c(c)(1), (c)(4)

130. 25 U.S.C. § 1780e(d)-(d)(1), (d)(4)(A)

131. 25 U.S.C. § 1780h

132. 25 U.S.C. § 1780i

133. 25 U.S.C. § 1780j(a)(1), (c)(1)

134. 30 U.S.C. § 1272(e)

135. 30 U.S.C. § 1281(d)

136. 42 U.S.C. § 6502

137. 43 U.S.C. § 971d

138. 43 U.S.C. § 1223

139. 43 U.S.C. § 1610(a)(1)-(2)

140. 43 U.S.C. § 1613(g)

141. 43 U.S.C. § 1615(a)

142. 43 U.S.C. § 1618(a)-(b), (c)(2), (c)(3)(B)

143. 43 U.S.C. § 1621(c)(2)(A)(i)-(iii), (j)(1)

144. 43 U.S.C. § 1629g(a)(6)(A)

145. 43 U.S.C. § 1629h(d), (g)

146. 43 U.S.C. § 1633(c)

147. 43 U.S.C. § 1634(a)(1)(A), (a)(1)(B)(ii), (f)(3)(A)

148. 43 U.S.C. § 1635(c)(1), (d)(1)-(2), (d)(6), (e), (h)(1), (*l*)(1), (o)(1)

149. 43 U.S.C. § 1641(b)(1)(A), (b)(2)-(4)

150. 43 U.S.C. § 1701 note

151. 43 U.S.C. § 1716(i)(1)-(2)

152. 43 U.S.C. § 1781(f)

153. 43 U.S.C. § 1783(a)

154. 43 U.S.C. § 1785(c)(2)(A)

155. 43 U.S.C. § 1786(c)(1), (c)(4), (d)(2)

156. 43 U.S.C. § 1787(b)(1), (b)(4)(A), (d)(2)

157. 45 U.S.C. § 1202(3)

158. 45 U.S.C. § 1203(b)(1)(B)-(C)

159. 45 U.S.C. § 1205(b)(1)(A), (b)(2)-(4)(A)(i)-(ii), (4)(B)

160. 45 U.S.C. § 1210

161. 48 U.S.C. § 1545(b)(2)

162. 48 U.S.C. § 1705(a)

163. 48 U.S.C. § 1971(a)